United States Court of Appeals for the Second Circuit

APPENDIX

ORIGINAL

77-6148, 6154

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

DUPONT GLORE FORGAN INCORPORATED, *et al.*,
Plaintiffs-Appellants,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants and Third-Party
Plaintiffs-Appellees-Appellants,

P/S

—against—

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
DEC 5 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPENDIX

VOLUME 1 of 3
Pages 1a to 472a

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9/29/75 K 23 Granted

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE WEINFELD

Jury demand date: **73 CIV. 2447**

CLASS ACTION

DUPONT GLORE FORGAN INCORPORATED, - 5/1[illegible]/75
THE HOME INSURANCE COMPANY,
MONSANTO COMPANY,
REYNOLDS SECURITIES, INC.,
SCHENLEY INDUSTRIES, INC.,
and
SWIFT & COMPANY, 7-16-75
On their own behalf and on behalf of all others similarly situated,
Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,
CINCINNATI BELL, INC.,
DIAMOND STATE TELEPHONE COMPANY,
ILLINOIS BELL TELEPHONE COMPANY,
[illegible] TELEPHONE [illegible],
MICHIGAN BELL TELEPHONE COMPANY,

$30

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DATE	NAME OR RECEIPT NO.	REC.	
6/1/73	Dornbush M	15—	
6/5/73	US Treas		15—

Action arose at:	Depositions

Docket Entries

DUPONT FIBRE FORGAN INCORP. ET AL VS. A T & T. ET*AL

73 CIV. 2447

DATE	PROCEEDINGS	Date Orde Judgment
Jun1-73	Filed Complaint. Issued Summons.	DP&W
Jun25-73	Filed ANSWER of defts to the complaint.	
Jun25-73	Filed defts' request for production of documents on class action issues.	
Jul 25-73	Filed pltffs. response to defts request for production of documents on class action issue.	
Aug. 1-73	Filed pltffs notice of motion requesting protrial order No. 1 ret. 8-21-73 at 2:15 P.M. in Room 2704	
Aug. 1-73	Filed pltffs notice of motion for determination under Rule 23(c)(1) as to whether this action is to be maintained as a class action - ret. 8-21-73 at 2:15 P.M. in Room 2704	
Aug. 1-73	Filed memorandum pf pltffs in support of stipulation and order remitting disqualification	
8-3-73	Filed stip. and order remitting disqualification.of Judge Weinfeld since he ownsstock in this case. So ordered, Weinfeld,J.	
8-3-73	Filed memorandum of law in support of stip. and order remitting disqualification(defts.)	
~~8-3-73~~ 8-16-73	Filed defts. notice of motion for an order directing pltfs. to comply with request for prod. of doc. on class action issues served by deft.on June 25,1973 ret. on:Aug. 21,1973.	
8-16-73	Filed defts. memorandum of law in support ofmotion for prod. of documents. ;	
8-16-73	Filed transcript of hearing dated July 9,1973.	
Aug 27-73	Filed affdvt. of Lawrence E. Walsh in response to motions for pretrial order and class-action.	
Aug 23-73	Filed memo endorsed on pltffs motion filed 8-1-73: "Disposition of motion deferred pending conference by counsel under Pre-Trial order #1 dtd. Aug. 21, 1973 - Weinfeld, J." (re motion for class action) m/n	
Aug 23-73	Filed memo endorsed on pltffs motion filed 8-1-73 for pre-trial order #1: "Motion granted - see annexed modified pre-trial order #1 dtd. 8-21-73 and filed 8-23-73 - Weinfled, J." m/n	
Aug 23-73	Filed PRE-TRIAL ORDER #1. - Weinfeld, J. (for order see motion filed 8-1-73 for pre-trial order -- order under the same back behind motion.)	
Aug.29,73	Filed Summons and Marshal's return served on the following:- Amer.Telephon & Telegraph Co., Bell Telephone Co. of Pa., Chesapeake & Potomac Telephone Col, Chesapeake & Potomac Telephone Co. of Md., Chesapeake & Potomac Telephone Co. of Va., Chesapeake & Potomac Telephone Co. of West. Va., Cincinnati Bell, Inc., Diamond State Telephone Co.,Illinois Bell Telephone Co., Indiana Bell Telephone Co., Michigan Bell Telephone Co., The Mountain States Telep Telegraph Co., New England Telepnone & Telegraph Co., N.J.Bell Telephone Co., N.Y.Telephone Co., Northwestern Bell Telephone Co., The Ohio Bell Telephone Co., Pacific Northwest Bell Telephone Co.,The Pacific Telephone &Telegraph Co. SouthCentral Bell Telephone Co., Southern Bell Telephone & Telegraph Co. Southern New England Telephone Co., Southwestern Bell Telephone Co., Wisconsin Telephone Co.	
Sep.21,73	Filed Pltffs' First Wave Interrogatories.	
Sep.25,73	Filed transcript of record of proceedings dated 8/21/73	
Oct-15-73	Filed for Defts. Notice of Deposition on Class Action.	
Oct-15-73	Filed for Defts. Objections to Pltffs' First Wave Interrogatories.	
Oct-30-73	Filed Pltffs' Notice of Motion to stay all discoveryreturnable 11/7/73 Rm506	
Nov.5-73	Filed Pltff. Notice of Motion and Memorandum of Law re: directing Defts. to Answer First Wave Interrogatories, returnable 11/13/73 Rm.1305.	
	(see pg. -3-)	

Docket Entries

INFELD - 73 Civ.2447 DuPONT GLORE FORGAN INC. V AMERICAN TELEPHONE ET AL.

CIVIL DOCKET ~~PAGE TWO~~

ATE	FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
.7-73	Filed Stipulation Pltff's motion to stay all discovery on class action is adjourned to Nov.13.1973 Rm 1305. The deposition of William Hogan subject to decision of Ct. on the motion by pltffs. be adjourned to Nov.28,1973. The production of documents by William Hogan Associates subject to motion is adjourned to Nov.16,1973 --Weinfeld,J (m/n)			
.8-73	Filed Memorandum of Law in Opposition to Motions to Terminate Class Action Discovery and to enforce first Wave Interrogatories.			
v.8-73	Filed Affidavit in Opposition to Motions to Terminate Class Action to Discovery and to Enforce first Wave Interrogatories.			
v.13-73	Filed Pltffs. Memorandum of Law in Support of Motion to Stay Class Action Discovery and to compel answers to Interrogatories			
v.13-73	Filed Affidavit in support of Motion to stay Class Action discovery and to compel answers to first wave interrogatories.			
.30-73	Filed Supplemental Memorandum of Law in Opposition to Pltffs' Claim of Atty Client Privilege on class action issues.			
.5-73	Filed response of pltfs. to supplemental memorandum of defts. on atty. client privilege.			
c.5-73	Filed affdt. of William F. Hogan(for pltf).			
.12-73	Filed defts. memorandum concerning discovery on class action issues.			
-21-73	Filed plaintiffs reply to defts' memorandum concerning discovery and class action issues.			
/73	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber			
3/73	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber			
9/73	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber			
15-74	Filed transcript of record of proceedings dated Nov. 13,1973.			
12-74	PRE-TRIAL CONFERENCE HELD BY MAG. Schreiber			
20-74	Filed defts. affdt. and notice of motion for leave to file a 3pty complaint, ret. on: Oct. 1,1974.			
20-74	Filed defts. memorandum of law in support of motion for leave to serve 3pty. compalint.			
.20-74	Filed affdt. of personal service by Wm. Lind that on Sept. 20,1974 he served 3pty. complaint on pltfs. atty.,personally and on Atty. Gen.,Wash.,DC by mail.			
.25-74	Filed pltfs. response to defts. motion for leave to serve 3pty.complaint.			
.1-74	Filed deft. and 3pty. pltf. affdt. of Guy Struve that he served a copy of the 3pty. summons and complaint by certified mail (rrr) to Atty. Gen.,Wash.,DC;and appointing Herbert Brauer to served the 3pty. summons and complaint upon USA. So ordered,Clerk.			
.1-74	Filed 3pty. complaint and summons issued.			
2-74	Filed summons with personal service.Herbert Brauer served a copy of the 3pty. summons and complainton the US Atty.and on the Atty. Gen., Wash.,DC by mail.			

(over)

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DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
Oct. 4-74	Filed memo end. on defts. motion dated Sept. 29,1974 for leave to serve a 3pty. complaint---Motion granted without opposition. So ordered,Weinfeld,J. m/n			
Oct.17-74	Filed stip. and order that defts. will select those documents which they believe to be of a confidential nature and mark them "protected";, etc. as indicated. So ordered,Weinfled,J.			
Sept 30-74	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber			
Nov 6-74	PRE-TRIAL CONFERENCE HELD BY Mag Schreiber			
Oct.24-74	Filed pltfs. 1st wave interog., second set, to defts.			
~~Nov-15-74~~	~~Filed report of Magistrate Raby.~~			
~~Nov-15-74~~	~~Filed memo endorsed on above report of Magistrate: Upon the foregoing report is it hereby ordered, that the action, having been settled, is hereby dismissed, without costs but with prejudice, except to the extent indicated in the said report of Magistrate Raby. Weinfeld, J. m/n~~ error Cbl.			
Nov.8-74	Filed defts. notice to take deposition on class action issues of pltfs. Reynolds Sec. on Nov. 21,22, 1974 and on Nov. 14,1974 defts. requests pltf. Reynolds Sec.,Inc. to produce documents,etc.			
Nov.15-74	Filed defts. notice to take deposition on class action issues of pltf. Home Ins. Co. on Nov. 26,27, 1974 and request for production of documents to said pltf. by Nov. 19,1974.			
Dec.4-74	Filed stip. and order that the time of 3pty. deft. to answer the 3pty. complaint is ext. to Dec. 31,1974. So ordered,Weinfeld,J.			
Nov.25-74	Filed deft. NY Telephone Co. answers and objections to pltfs. 1st wave interrog.,2nd set.			
Nov.26-74	Filed deft. AT&T answers and objections to pltfs. 1st wave interrog,2nd s			
Nov.29-74	Filed defts. notice to take deposition of pltf. Monsanto Co. on Dec.12,1 1974 and request for production of documents before Dec.5,1974			
Dec.6-74	Filed defts. notice to take deposition of Edward Cameron,III on Dec. 10,19 in Rm.121 at 10am.(subpoena issued)			
Dec.12-74	Filed defts. Chesapeake and Potomas Telephone Co. answers and objectsions to pltfs. 1st wave of interrog,second set.			
Dec.16-74	Filed 3pty. deft. affdt. and notice of motion for an order extending the time of 3pty. deft. to answer complaint from the present date of Dec.31,1974 to Jan. 31,1975,etc. ret. on:(date to be fixed by Court).			
Dec.13-74	Filed deft. Southwestern Bell Telephone Co. answers and objections to pltfs 1st wave interrog,2nd set.			
Dec.13-74	Filed deft. Illinois Bell Telephone Co. answers and objections to pltfs. 1 wave interrog,2nd set.			
Dec.19-74	Filed stip. and order that by Dec.30,1974 pltfs. will furnish defts. addt documents whose production was directed by Mag. Schreiber on Dec.17,1974 etc. as indicated;by Jan.24,1975 defts. file their papers in response to pltfs. motion for class action determination;by Feb.14,1975,pltfs. serve and filed papers in response to the papers served by defts and by Feb.21 1975,defts. serve and file their reply papers in response to papers serv etc.as indicated. Mag. Schreiber, So ordered,Weinfeld,J.			

Docket Entries

ET AL. V. AMERICAN TELEPHONE & TELEGRAPH CORP. ET AL.

73 Civ 2447 WEINFELD, J.

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DATE	PROCEEDINGS
01-10-75	Filed Stipulation and order extending time to answer with respect to 3rd [illegible] to 1/31/75 - WEINFELD, J.
01-15-75	Filed Memo endorsed on 3rd party def motion filed on Dec 16, 1974 - The within motion is hereby withdrawn, as per letter dated 1-9-75 by Third Paty deft U.S.A. So Ordered - WEINFELD, J.
[illegible]	[illegible] pltfs affidavit in opposition to [illegible] motion for class action treatment.
[illegible]	[illegible] affidavit of service by mail of [illegible]
[illegible]	[illegible] of law in opposition to above motion.
01-31-75	Filed exhibits to deposition of Willicm F. Hogan Asso. Inc. by William F. Hogan (excluding exhibits withheld by pltfs. under claim of privilege)
01-31-75	Filed exhibits to deposition of Reynolds Securities inc. by Melvin O. Wright and Alfred J. Rauschman (excluding exhibits withheld by pltfs. under claim of privile
01-31-74	Filed exhibits to deposition of Monsanto Co. by F. Thomas Hogan and J.R. Matlock)excluding exhibits withheld by pltfs. under claim of privilege)
01-31-75	Filed exhibits to deposition of the Home Ins. Co. by George Horne and Charles R. Schader and to Deposition of Edward M. Cammeron 111(excluding exhibits withheld by pltfs. under claim of privilege)
01-31-75	Filed transcrip of deposition of the Home Ins. Co. by George Horne and Charles R. Schader and of deposition of Edward M. Cameron, 111
01-31-75	Filed transcript of deposition of Monsanto Co. by F. Thomas Hogan and J.R. Matlock
01-31-75	Filed transcript of deposition of Reynolds Securities Inc. by Melvin O. Wright and Alfred J. Rauschman.
01-31-75	Filed transcript of deposition of William F. Hogan Associates, Inc. by William F. Hogan.
01-31-75	Filed third-pty. deft answer to third-pty complaint
02-13-75	Filed deft's. first interrog. and request for documents on substantice issues
02-14-75	Filed affdvt. of William A. Bradford Jr. for pltf's.
02-14-74	Filed reply memo. of law in support of pltfs. of motion for class action.
02-14-75	Filed appendix to reply memo. of law in support of pltfs. motion for class action
02-21-75	Filed defts 3rd-pty reply memo of law in opposition to pltfs. motion for class action treatment
02-28-75	Filed memo. of law by United States in opposition to Pltfs. motion for class action.
03 07 75	Filed pltf's memo. of law in reply to the U.S. opposition to pltfs motion for class action treatment
03-18-75	Filed affdvt. of R. Clark Wadlow dated 3-17-75 for pltf.
03-18-75	Filed Pltf. notice of motion for an order for Voluntary dismissal ret. 4-1-75
03-18-75	Filed memo. of law in support of above motion for voluntary dismissal. for The Home Ins. Co.
03-31-75	Filed pltfs. REPLY memorandum of law in support of the motion of pltf The Home Inc. Co. for voluntary dismissal
04-04-75	Filed Memo. end. onmotion filed 3-18-75 for voluntary dismissal Pltf. Home Ins. Co. motion for voluntary dismissal is granted on condition that pltf. Home Inc. Co. remains liable for any costs which may ultimately be taxed on favor of deft. which have accrued to the date hereto. dismissal is without prejudice-- So ordered--Weinfeld, J. m/n
04-04-75	Filed defts and 3rd-pty pltfs. affdvt. with respect to motion for voluntary dismissal
04-04-75	Filed memorandum of law with respect to motion of the Home Ins. company for voluntary dismissal by defts. and 3rd-pty pltfs.
04-15-75	Filed affdvt. respect to the motion of pltf The Home Ins. Co. for permission to withdraw as a named pltf. in this action.
04-15-75	Filef affdvt. of service by mail in re. to motion of The Home Ins. Co. for voluntary dismissal.

Docket Entries

73 Civ. 2447

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DATE	PROCEEDINGS	Date Judgm
04-17-75	Filed pltf. notice of motion for voulntary dismissal ret. 4-29-75	
04-17-75	Filed pltf. memorandum of law in support of above motion for voluntary dismissal.	
04-17-75	Filed addvt. of I R. Clark Wadlow with attachement of various copyies of exhibits	
04-23-75	Filed affdvt. of Guy M. Struve with respect to motion for voluntary dismissal	
04-23-75	Filed memorandum of law with respect to motion of Dupont Glore Forgan Inc. for voluntary dismissal	
04-28-75	Filed plaintiff's supplemental memorandum in support of motion of Dupont Glore Forgan Inc. for voluntary dismissal	
05-01-75	Filed Memo. End. on motion filed 4-17-75 Dupont's motion for voluntary dismissal is granted on condition that Dupont remain liable for any costs which have accured to date . simular to releif granted in the instant of Home Inc. and without prejudice to defts. Moving to recover the cost of discovery So Ordered --Weinfeld, J. m/n	
05-15-75	Filed plaintiff Swift & Co.'s answers to defts' first interrog. and request for documents on substantive issues.	
05-15-75	Filed plaintiff Monsanto Co.'s answers to defts' first interrog. and request for docume substantive issues.	
05-15-75	Filed plaintiff Reynolds Securities Inc,'s answers to defts' first interrog. and request for documents on substantive issues.	
05-20-75	Filed Memo. Endorsed on motion filed 8-1-73 --The Court is persuaded that the class action motion cannot be determined until the fact issues centering about the alleged sloicitation of pltfs. is resolved. This aspect of defts a challenge to pltf's as adequate representatives of the proposed class bristles with disputed fact issues as to the circumstances under which the atty's ware retained. Accordingly, the matter is referred to Magistrate Schrieiber to hear and report to the Court--Weinfeld, J. m/n	
03-29-75	[illegible] proceedings, dated March 7, 1975	
05-29-75	Filed Transcript of record of proceedings dated March 20, 1975	
05-29-75	PRE-TRIAL CONFERENCE HELD BY Mag Schreiber	
06-09-75	PRE-TRIAL CONFERENCE HELD BY Mag Schreiber	
06-25-75	Filed pltf. memorandum and notice of motion for voluntary dismissal ret. 7-8-75	
07-07-75	Filed pltf's supplemental memorandum in support of motion of Swift & Co. for voluntary dismissal	
07-10-75	[illegible] dated April 21, 1975	
07-10-75	[illegible] dated April 29, 1975	
07-14-75	Filed deft. and 3rdpty pltf affdvt. with respect to motion for voluntary dismissal	
07-1-475	Filed defts and 3rd-pty pltf memorandum of law with respect to motion of Swift & Co. for voluntary dismissal	
07-16-75	Filed Order upon pltf. motion for voluntary dismissal upon all pleadings and proceedings that the claims of Swift & Co. are dismissed without prejudice that Swift & Co. remain liable for any costs, and upon condition that such dismissal be without prejudice to a motion by defts to recover from Swift & Co. the costs of discovery. If and when costs are taxed in favor of defts at the conclusion of the captioned action--Weinfeld, J. m/n	
07-25-75	Filed Transcript of record of proceedings, dated May 29, 1975	
07-08-75	Filed pltfs. atty's affdvt. and order to show cause Ordered that defts and 3pty pltfs. show cause in Rm. 2703 on 8-12-75 at 2:15 p.m. why an order should not be entered adj. ret. date of their motion. service rendered on 8-8-75 Weinfeld, J.	
08-08-75	Filed pltfs. memorandum of law in support of request for adjournment	
09-16-75	Filed Consent Order to change atty's pltfs. Monsanto Co., Reynolds Securities, Inc. and Schenley Industries, Inc.--Weinfeld, J. m/n	

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EPHONE & TELEGRAPH ET AL **JUDGE WEINFELD**

D. C. 110 Rev. Civil Docket Continuation **Page -6-**

DATE	PROCEEDINGS
09-16-75	Filed stip. and order that the time within which pltfs.may respond to defts request for production of documents is ext. to through including the 10th day following entry of an order adjudicating the motion of defts and 3pty pltfs of 9-2-75 for review by the Court of the determination of Hon; Sol Schreiber Mag. --Weinfeld, J.
09-18-75	Filed Transcript of record of proceedings dated Aug 12, 1975
09-24-75	Filed stip. and order ~~extx~~Hogan & Hartson time to respond to defts request for production of document to include the 10th day following entry of an order adj. motion ---Weinfeld, J.
09-29-75	Filed defts and 3pty pltfs affdct. and notice of motion for review. ret. 8-12-75
09-29-75	Filed defts and 3pty pltfs. memorandum of law in support of above motion for review
09-29-75	Filed defts. and 3pty pltfs Reply memorandum of law in support of motion fro review
09-29-75	Filed pltfs. affdvt. in opposition to the motion of the defts American Telephone and Telegraph Co. for review of the
09-29-75	Filed pltfs. memorandum of law in opposition to motion of defts. AT&T
09-29-75	Filed defts request for documents in the possession, custody, or control of Hogan Hartson.
09-29-75	Filed deft. AT&T affdvt. in opposition to pltfs motion for class action treatment
09-29-75	Filed pltfs Reply memorandum of law in support of pltfs motion fwr class action determination pursuant to rule 23
09-29-75	Filed pltfs. Reply memorandum of law in support of pltfs' motion for class action determination pursuant to rule 23 (appendix)
9/29/75	Filed Transcript of record of proceedings dated 9/2/75 } Copies
9/29/75	Filed Transcript of record of proceedings dated 9/19/75 }
09-29-75	Filed OPINION # 43139 For all of the stated reasons, the court is satisfied that a class action is "superior" under the rule, Accordingly, the motion for class action determination is granted--Weinfeld, J. (pltf) m/n
10-06-75	Filed pltfs Respond to defts request for documents
10-08-75	Filed pltf. objection to defts request for production of documents in the possession Custody or control of Hogan & Hartson.
10-18-75	Filed reply memorandum of law in support of pltfs' motion for class action. (duplicate - see entry 9-29-75)
10-18-75	Filed APPENDIX to reply memorandum of law in support of pltfs' motion for class action determination.
10-18-75	Filed reply memorandum of law in opposition to plaintiffs' motion for class action determination.
11-20-75	Filed transcript of record of proceedings dated Sept 19, 1975
11-20-75	Filed transcript of record of proceedings dated Sept 2, 1975
12-04-75	Filed pltf affdvt. and notice of motion for a review ret. 12-2-74 With memo, and disposed of as indicated upon argument-- Weinfeld, J. m/n
12-04-75	Filed pltf affdvt. in opposition to motion for review
12-04-75	Filed pltfs memorandum of law in support of pltf's motion for review
12-10-75	Filed Consent Order maintaining case as class action under rule 23(b) (3); defts to furnish cpimsel for pltf. with a list of each member of each class etc. notice ot be mailed out in form annax hereto, class members who which to appear are to file appearance no later tham 60 days for mailing of notice. Exclusion and claims to be mailed to Clerk in c/o a post office box to be rendered for all atty's for pltf. Within two weeks after the last date for the mailing of request for exclusion, pltfs shall file with the Court a list of the names and addresses of the class members who have requested exclusion, together with the completed forms of request for exclusion recei pltfs--Weinfeld, J. m/n
02-18-76	Filed Transcript of record of proceeding dated 2-10-76 (copy)

continue on page -7-

DATE	PROCEEDINGS	Date O Judgme
02-17-76	Filed affdvt of Richard C. Manfredi in re. to mailing of form of request for exclusion pursuant to the terms of this Court's order entered on 1-10-75.	
02-19-76	Filed affdvt. of Richard C. Manfredi in re. to carrying out the second mailing to members of class notices of class action determination and form of request for exclusion, pursuant to terms of this court's order entered 12-10-76	
03-09-76	Filed transcript of record of proceedings dated 12-2-75	
01-25-76	Filed pltfs request for production of documents	
02-25-76	Filed pltfs notice of second waive of depositions to be taken as indicated herein.	
02-25-76	Filed pltfs notice of first waive of deposition	
02-25-76	Filed pltfs notice of waive of depositions of all parties listed herein.	
03-15-76	Filed plaintiffs request for production of documents by USA set No. 1.	
03-15-76	Filed plaintiffs request for production of documents set No.1 amended.	
03-15-76	Filed plaintiffs notice of 2nd wave depositions (amended) First Round.	
04-08-76	Filed pltfs affdvt. of Michael S. Oberman pursuant to paragraph 7 of the order of this Court entered on 12-10-75	
04-08-76	Filed (received from Attorney for the Class: Nickerson Kramer, et.al.) one vol. Exclusions which were mailed with postmark 3-29-76, in accordance with Court's order entered 12-10-75.	
4-15-76	Filed deft & third party (SNETCO) Response tp pltff's request for production of documents set # 1 (amemded)	
4-15-76	Filed deft & third party pltff (N.Y.T.) response to pltff's request for production of documents set #1 (amended)	
4-15-76	Filed deft & third party p;tff (AT & T) response to pltff's request for of documents -set #1 (amended)	
4-15-76	Filed deft & third party pltff (SWB) response to pltff's request for production of documents set #1(amended)	
05-15-76	Filed notice of appearance by counsel for Delta Air Lines and request to be included in settlement, m/copy to attorney for class. (Nickerson)	
05-21-76	Filed pltfs' 2nd wave of interrog., first set.	
05-18-76	Filed pltfs notice to take depositions of Harold A. Shyder, et.al. on dates indicated herein, and request to produce.	
07-02-76	Filed defts' 2nd interrog. and request for production of documents on substantive issues.	
07-02-75	Filed defts' notice of depositions on substantive issues of ea. person named in response to interrog.	
7-22-76	Fld Answers & objections to pltff's second wave interrog first set	
7-22-76	Fld response to pltff's request for production of documents by U.S.A. (set #1)	
7-22-76	Fld DEFT & Third Party Pltff to Central Bell Telephone Co answers & objections to pltff's second wave interrog first set	
7-22-76	Fld deft & third party pltff Southern Bell & Telegraph Co Answers & objections to pltff second wave interrog first set	
7-22-76	Fld deft & third party pltff the Chesapeake & Potomac Tele Co answers & objections to pltff's second wave interrog first set	
7-22-76	Fld DEFT & third party pltff The Mountain STate T&T Co answers & objecti to pltff's second wave interrog first set	
7-22-76	Fld deft & third party pltff Indiana Bell Tele Co answers & objections second wave interrog first set	
7-22-76	Fld deft & third party pltff The Diamond State Tele Co answers & objec to pltff's second wave interrog first set	

-CONTINUED ON PG 8-

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DATE	PROCEEDINGS	Date Judg
7-22-76	Fld deft & third party pltff N.J. Bell Tele Co answers & objections to pltff's second wave interrog first set	
7-22-76	Fld deft& third Party pltff The Cheseapeake & Potomac Tele Co of MD answers & objections to pltff's second swave interrog first set	
7-22-76	Fld deft & third party pltff Northwestern Bell Tele Co answers & objections to pltff's second weve interrog first set	
7-22-76	Fld deft third party pltff The Bell Tele Co of PA answers & objections to pltff's second wave interrog first set	
7-22-76	Fld deft & third party pltff Pacific N.W. Bell TEle Co answers & object pltff's second wave interrog first set	
7-22-76	Fld deft & third party Cincinatti Bell Inc answers & objections to pl second wave interrog first set	
7-22-76	Fld deft & third party pltff Pacific Tele & Teleg Co answers & object to pltff's second wave interrog first set	
7-22-76	Fld deft & third party pltff Ill Bell Tele answers & objections to pltff's second wave interrog first set	
7-22-76	Fld deft & third party pltff The New England TEle Co answers & objections to pltff's second wave interrog first set	
7-22-76	Fld deft & third party pltff The Ohio Bell Tele Co answers & objection tosecond wave interrogs first set	
7-22-76	Fld deft & third party pltff Wisconsin Tele Co answers & objections to pltff's second wave interrog first set	
7-22-76	Fld deft & third party pltff Michigan Bell TEle Co answers & objecti to pltff's second wave interrog's first set	
7-22-76	Fld deft & third party pltff The chesapeake & potomac TEle Co of W. Virginia answers & objections to pltff's second wave interrog's first set	
8-3-76	Fld pltff's answers & objections to deft's second interrog's & request for production	
08-02-76	Filed deft. and 3rd. pty pltf. answers and objections to pltfs second wave interrog. (first set)	
08-1?-76	Filed Defts, Interrogatories as to expert witnesses	
08-13-76	Filed [illegible] second wave Interrogatories Second Set	
08-?3-76	Filed Pltf's Notice of Deposition of Frederick Smith on 9/14/76; Scott Shepherd, 9/15/76; [illegible] Crabb on 9/21/76 at 10 A.M.	
[illegible]-76	Filed Pltff Notice of Deposition of deft. and 3rd pty Pltff on 9/22/7 the deposition to continue from day to day	
08-[illegible]-76	Filed Pltf Notice of Deposition of Trial Witness at 10AM on 9/2	
08-24-76	Filed pltf's [illegible] interrog., [illegible] set.	
08-26-76	**Filed suppl. response by US to pltf's request for production of documents.**	
09-07-76	Filed 3rd pty deft's affdvt. in opposition to pltfs motion to compel.	
09-07-76	Filed 3rd pty deft's memorandum in opposition to pltfs motion to compel.	
09-09-76	Filed plaintiffs' suppl. answers and objections to defts' 2nd interro and request for production.	
09-09-76	Filed plaintiffs' 2nd waive interrog., fourth set.	
09-10-76	Filed preliminary objections to pltfs' 2nd wave interrog., 2nd & 3rd set. (objections of deft, & 3rd pty pltfs)	
10-13-76	Filed by AT&T answers and objections to pltfs' 2nd wave interrog., 4th set.	

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DATE	PROCEEDINGS	Date Or Judgmen
10-13-76	Filed by Bell of Pa. answers and objections to pltfs' 2nd wave interrog. - 4th set.	
10-13-76	Filed by C&P answers and objections to pltfs' 2nd wave interrog. - 4th set.	
10-13-76	Filed by C&P of Virginia answers and objections to pltfs' 2nd wave interrog., 4th set.	
10-13-76	Filed by C&P of Maryland answers and objections to pltfs' 2nd wave interrog., 4th set.	
10-13-76	Filed by Cincinnati Bell answers and objections to pltfs' 2nd wave interrog., 4th set.	
10-13-76	Filed by C&P of West Virginia answers and objections to pltfs' 2nd wave interrog., 4th set	
10-13-76	Filed by Diamond State answers and objections to pltfs' 2nd wave interrog., 4th set	
10-13-76	Filed by Ill. Bell answers and objections to pltf's 2nd wave interrog., 4th set	
10-13-76	Filed by Michigan Bell answers and objections to pltfs' 2nd wave interrog., 4th set	
10-13-76	Filed by Indiana Bell answers and objections to pltfs' 2nd wave interrog., 4th set	
10-13-76	Filed by New England Tel. answers and objections to pltfs' 2nd wave interrog., 4th set.	
10-13-76	Filed by Mountan States answers and objections to pltfs' 2nd wave interrog., 4th set	
10-13-76	Filed by NYT answers and objections to pltfs' 2nd wave interrog., 4th set.	
10-13-76	Filed by N.J. Bell answers and objections to pltfs' 2nd wave interrog., 4th set.	
10-13-76	Filed by Ohio Bell answers and objections to pltfs' 2nd wave interrog., 4th set	
10-13-76	Filed by PNB answers and objections to pltfs' 2nd wave interrog., 4th set,	
10-13-76	Filed by Pacific Tel. answers and objections to pltfs' interrog., 4th set, 2nd wave	
10-13-76	Filed by NWB answers and objections to pltfs' interrog., 4th set, 2nd w	
10-13-76	Filed by SCB answers and objections to pltfs' interrog., 4th set, 2nd w	
10-13-76	Filed by Southern Bell answers and objections to pltf's interrog., 4th set, 2nd wave	
10-13-76	Filed by Southwestern Bell answers and objections to pltfs' interrog. 4th set, 2nd wave	
10-13-76	Filed by WTC answers and objections to pltf's interrog., 4th set, 2nd w	
10-13-76	Filed by SNETCO answers and objections to pltfs' interrog. 4th set 2nd wave.	
10-13-76	Filed defendants affdvt. of service of answers and objections to interrog. (all answers filed this date)	
10-20-76	Filed Bell Ohio Bell answers and objection to pltfs' second wave interrog 3rd set.	
10-20-76	Filed deft. 3rd-pty pltf PNB objections to pltf's interrog. second wave 3rdset	
10-20-76	Filed deft. 3pty pltf. NWB answers and objection to pltfs second wave interrog	
10-20-76	3rd. set	
10-20-76	Filed deft. 3pty pltf. WTC answers and objection to pltfs second wave inter og. (Third Set)	
10-20-76	Filed deft. 3rd-pty pltf. Southwestern Bell Co. answers and objections to pltfs second wave interrgo (Third Set)	
10-20-76	Filed deft. and 3rd-pty pltf. (SNETCO) answers and objection to pltfs second wave interrog (Third Set)	

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DATE	PROCEEDINGS
10-20-76	Filed deft. and 3rd-pty pltf American Telephone and Telegraph Co answers and objection to pltfs second wave interrgo (Third Set)
10-20-76	Filed deft. and 3rd-pty pltf. (SCB) answers and objection to pltfs second wave interrog. (Third Set)
10-20-76	Filed deft. and 3rd-pty pltf. (Pacific Tel) answers and objection to pltfs second wave interrog. (Third Set)
10-20-76	Filed deft. and 3rd-pty pltf. (Southern Bell) answers and objection to pltfs second wave interrog. (Third Set)
10-20-76	Filed deft. and 3rd-pty pltf. (Bell of Pa.) answers and objections to pltfs second wave interrog. (Third Set).
10-20-76	Filed deft. and 3rd-pty pltf. (C&P) answers and objections to plts second wave interrog (Thirs Set)
10-20-76	Filed deft. and 3rd-pty pltf. (C& P of Maryland) answers and objections to pltfs second wave interrog (Third Set)
10-20-76	Filed deft. and 3rd-pty pltf. (C&P of Virginia) answers and objections to pltfs second wave interrog (Third Set)
10-20-76	Filed deft. and 3rd-pty pltf. answers and objections to pltfs second wave interrog. (Third Set) by (C&P of West Virginia)
10-20-76	Filed deft. and 3rd-pty pltf. (Cincinnati Bell) answers and objections to pltfs second wave interrog. (Third Set)
10-20-76	Filed deft. and 3rd-pty pltf (Diamond State) answers and obejctions to pltfs second wave interrog (Third Set)
10-20-76	Filed deft. and 3rd-pty pltf. (Illinois Bell) answers and objections to pltfs second wave interrog. (Third Set)
10-20-76	Filed deft. and 3rd-pty pltf. (Indiana Bell) answers and objections to pltfs second wave interrog. (Third Set).
10-20-76	Filed deft. and 3rd-pty pltf. answers and objections to pltfs second wave interrog. (Third Set)
10-20-76	Filed deft. and 3rd-pty pltf. answers and objections to pltfs second wave interrog. (Third Set)
10-20-76	Filed deft. and 3rd-pty pltf. answers and objections to second wave interrog. (Third Set)
10-20-76	Filed deft. and 3rd-pty pltf. answers nad objections to pltfs second wave interrog. (Third Set)
10-20-76	Filed deft. and 3rd-pty pltf. answers and objections to pltfs second wave interrog. (Third Set)
10-29-76	Filed 3rd pty deft's interrog. to defendants and 3rd pty plaintiffs
10-29-76	Filed 3rd pty deft's interrog. to pltf.
11-17-76	Filed [illegible] suppl. and amended answers to pltfs 2nd wave interrog. 1st set.
11-17-76	Filed SWB's suppl. answers to pltfs' 2nd wave interrog., 4th set.
11-17-76	Filed SNETCO's suppl. answers to pltfs' 2nd wave interrog., 4th set
11-17-76	Filed South Central Bell's suppl. and amended answers to pltfs' 2nd wave interrog., 1st set.
11-17-76	Filed Pacific's suppl. and amended answers to pltfs' 2nd wave interrog 1st set.
11-17-76	Filed PNB's suppl. and amended answers to pltfs' 2nd wave interrog., 1st set.
11-17-76	Filed Ohio Bell's suppl. and amended answers to pltfs' 2nd wave interrog., 1st set.
11-17-76	Filed NWB's suppl. and amended answers to pltfs' 2nd wave interrog., 1st set.
11-17-76	Filed NJB's suppl. and amended answers to pltfs' 2nd wave interrog., 1st set.

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Dupont Glore Forgan Inc. et.al. vs.
A.T.& T., et.al.

DATE	PROCEEDINGS	Date Judgm
11-17-76	Filed New England Tel.'s amended answers to pltfs' 2nd wave interrog., 1st set.	
11-17-76	Filed Mountain States suppl. and amended answers to pltfs' 2nd wave interrog., 1st set	
11-17-76	Filed Michigan Bell's suppl. and amended answers to pltfs' 2nd wave interrog., 1st set.	
11-17-76	Filed Indiana Bell's suppl. and amended answers to pltfs' 2nd wave interrog., 1st set.	
11-17-76	Filed Ill. Bell's supplemental and amended answers to pltfs' 2nd wave interrog., 1st set.	
11-17-76	Filed Diamond State's suppl. and amended answers to pltfs' 2nd wave interrog., 1st set.	
11-17-76	Filed Cincinnati Bell's suppl. and amended answers to pltfs' 2nd wave interrog., 1st set.	
11-17-76	Filed C&P of W.Virginia's suppl. and amended answers to pltfs' 2nd wave interrog., 1st set.	
11-17-76	Filed C&P's amended answers to pltfs' 2nd wave interrog., 1st set.	
11-17-76	Filed C&P of Virginia's suppl. and amended answers to pltfs' 2nd wave interrog., 1st set.	
11-17-76	Filed C&P of Maryland's suppl. and amended answers to pltfs' 2nd wave interrog., 1st set.	
11-17-76	Filed Bell of Pa.'s suppl. and amended answers to pltfs' 2nd wave interrog., 1st set.	
11-19-76	Filed defts request for admission.	
11-30-75	Filed by deft. "WTC" answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. "AT&T" suppl. answers to pltfs' 2nd wave interrog., 4th set.	
11-30-76	Filed by deft. "SNETCO" answers and objections to 3rd pty deft's interrog.	
11-30-76	Filed by deft. "SWB" answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. Southern Bell answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. "Pacific" answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. "South Central Bell" answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. Ohio Bell" answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. "PNB" answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. "NYT" answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. "NWB" answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. "New England Tel." answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. "NJB" answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. "Michigan Bell" answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. "Mountain States" answers and objections to 3rd pty def interrog.	
11-30-76	Filed by deft. "Indiana Bell" answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. "Illinois" answers and objections to to 3rd pty defts interrog.	
11-30-76	Filed by deft. "Cincinati Bell" answers and objections to 3rd pty defts interrog.	
11-30-76	Filed by deft. "Diamond State" answers and objections to defts interro	

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Dupont Glore Foreign Inc. et.al. vs. A.T.& T., et.al.
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DATE	PROCEEDINGS
11-30-76	Filed deft. "C&P of Virginia" answers and objections to 3rd pty defts interrog.
11-30-76	Filed by deft."C&P of West Virginia" answers and objections to 3rd pty defts interrog.
11-30-76	Filed by deft. "C&P" answers and objections to 3rd pty defts interrog.
11-30-76	Filed by deft. "C&P of Maryland" answers and objections to 3rd pty defts interrog.
11-30-76	Filed by deft. "AT&T" answers and objections to 3rd pty defts interrog.
11-30-76	Filed by deft. "Bell of Pa." answers and objections to 3rd pty defts interrog.
12-02-76	Filed pltfs answers and objections to 3rd pty defts interrog.
12-01-76	Filed by "AT&T" 2nd suppl. answers to pltfs 2nd wave interrog., 4th set.
12-01-76	Filed by "Bell of Pa." suppl. answers to pltfs 2nd wave interrog 1st set.
12-01-76	Filed by "C&P" suppl. answers to pltfs 2nd wave interrog., 1st s
12-01-76	Filed by "C&P of Maryland" suppl. answers to pltfs. 2nd wave interrog., 1st set.
12-01-76	Filed by"C&P of Virginia" suppl. answers to pltfs 2nd wave inter 1st set.
12-01-76	Filed by"C&P of West Virginia" suppl. answers to pltfs 2nd wave interrog., 1st set.
12-01-76	Filed by "Cincinnati Bell" suppl. answers to pltfs 2nd wave interrog., 1st set.
12-01-76	Filed by "Diamond State" suppl. answers to pltfs 2nd wave interr 1st set.
12-01-76	Filed by "Ill.Bell" suppl. answers to pltfs 2nd wave interrog., 1st set.
12-01-76	Filed by "Indiana Bell" suppl. answers to pltfs 2nd wave interr 1st set.
12-01-76	Filed by "Michigan Bell" suppl. answers to pltfs 2nd wave inter. 1st set.
12-01-76	Filed by "Mountain States" suppl. answers to pltfs 2nd wave int 1st set.
12-01-76	Filed by "New England Tel." suppl. answers to pltfs 2nd wave interrog., 1st set.
12-01-76	Filed by "New Jersey Bell" suppl. answers to pltfs 2nd wave interrog., 1st set.
12-01-76	Filed by "NYT" suppl. answers to pltfs 2nd wave interrog., 4th
12-01-76	Filed by "NWB" suppl, answers to pltfs 2nd wave interrog., 1st
12-01-76	Filed by "Ohio Bell" suppl. answers to pltfs interrog., 2nd wav 1st set.
12-01-76	Filed by"PNB" suppl. answers to pltfs 2nd wave interrog., 1st s
12-01-76	Filed by "Pacific" suppl. answers to pltfs 2nd wave interrog.,
12-01-76	Filed by "SCB" suppl. answers to pltfs 2nd wave interrog., 1st
12-01-76	Filed by "Southern Bell" suppl. andwers to pltfs 2nd wave inter 1st set.
12-01-76	Filed by "SNETCO" 2nd suppl. answers to pltfs 2nd wave interrog 4th set.
12-01-76	Filed by "SWB" 2nd suppl. answers to pltfs 2nd wave interrog.,
12-01-76	Filed by "WTC" suppl. answers to pltfs 2nd wave interrog., 1st
12-01-76	Filed by "AT&T" suppl. response to pltfs request for productio documents - set 1 amended.

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Dupont Glore Forgan Inc. vs. AT&T et.al.

DATE	PROCEEDINGS
12-01-76	Filed by "NYT" suppl. response to pltfs request for production of documents set No.1 amended.
12-01-76	Filed by "SNETCO" suppl. response to pltfs request for production of documents - set No.1 amended.
12-01-76	Filed by "SWB" suppl. response to pltfs request for production of documents - set No.1 amended.
12-9-76	Filed Govts. affdvt. for discovery concerning amount of excise taxed properly payable to U.S. From deft. & Third party pltffs.
12-9-76	Filed memorandum in support of affdvt. filed 12-9-76.
12-20-76	Filed by 3rd pty deft. USA - Rule 9(g) statement and notice of motion for summary judgment - ret. 12-28-76 (against 3rd pty pltfs)
12-20-76	Filed by USA memorandum of law in support of motion for summary judgment against 3rd pty plaintiffs
12-21-76	Filed pltfs responses and objections to request for admissions
12-21-76	Filed pltfs answers to defts interrog. as to expert witnesses
12-22-76	Filed responses of US to defendants' request for admissions.
12-27-76	Filed stip. and order adj. motion of 3rd pty deft. for summary jdgt. to 01-18-76 -- Weinfeld, J.
12-29-76	Filed by defendants and 3rd pty plaintiffs - affdvt., statement under Rule 9(g) and noticeof motion for partial summary judgment - ret. 12-28-76
12-29-76	Filed defendants and 3rd pty plaintiffs memorandum in support of above motion.
01-04-77	Filed pltfs amended responses and objections to request for admissions.
01-10-77	Filed defts memorandum of law in opposition to Government's motion for summary judgment.
01-10-77	Filed defts statement pursuant to Rule 9(g)
01-18-77	Filed reply memoradum insupport of motion for partial judgment
01-19-77	Filed 3rd party deft Statement & notice of motion for partial summary Judgment 1-25-77
01-19-77	Filed memoradum of U.S. insupport of its motion for partial summary judg as to cts II , IV, & VI of pltff's complaint
01-19 -77	Filed reply memoradum of the U.S. in support of motion to dismiss deft third party complaint
02-03-77	Filed amended responses of US to defts' request for admission.
02-04-77	Filed answers and objections to pltfs' 2nd wave interrog., 2nd set.
03-01-77	**Filed consent pre-trial order -- Weinfeld, J.**
03-01-77	**Filed stip. and order as to documents. -- Weinfeld, J.**
03-01-77	**Filed stip. and order of Facts. -- Weinfeld, J.**
3-18-77	**Filed notice pursuant to Fed. R. Evid. 803(24), by pltff class.**
3-23-77	**Filed pltffs affdvt in opposition to deft &3rd-pty pltffs motion for partial summary judgment on Counts II, IV & VI of the complt, etc. (Rule 9(g) statement included).**
3-23-77	**Filed pltffs memo of law in opposition to defts motion for partial summ judgment.**

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WEINFELD, J

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
DU PONT GLORE FORGAN INC.	AT&T, et al	DOCKET NO. 73-2447 PAGE 14 OF ____ PAGE

DATE	NR.	PROCEEDINGS
3-23-77		Filed Opinion #45721 & Order. Pltffs commenced this class actio to recover communications excise taxes which they allege were ove collected by defts, acting as statutory collecting agents for the government. Pltffs are users of "Centrex" systems. The defts ar AT&T & twenty-three affiliated operating companies. Defts have served a 3rd-pty complt seeking recovery from the United States i the events pltffs prevail in their action. The complt contains eight counts. Counts I, III, & V allege that defts failure to ma separate charges for intra-office communication service between 1966 & 1972 violated federal statutory & common law fiduciary du etc. Defts move for summary judgment only on Counts II, IV & VI upon the ground these asset claims for refund of taxes, which ca be maintained only against the U.S; alternatively, they seek par summary judgment on these counts as to those members of the pltf [illegible] who have not filed administrative claims for refunds. The [illegible]. supports the defts motion & in addition has moved for summar judgment on the 3rd-pty complt. For the reasons stated, defts mo for summary judgment on Counts II, IV & VI of the complt is grant & dismissed. The remaining counts are all grounded upon the alleg tortious conduct of defts, & for reasons stated must be dismised. For all the remaining issues stated, the motion of the U.S., the 3rd-pty deft, for summary judgment dismissing the 3rd-pty complt, is granted. So Ordered, WEINFELD,J. n/m
4-4-77		Filed pltffs Proposed Findings of Facts & Conclusions of Law.
4-4-77		Filed pltffs Pre-Trial Memorandum.
4-4-77		Filed defts Propposed Findings of Fact & Conclusions of Law.
4-4-77		Filed Defts Pre-Trial Memorandum.
4-4-77		Filed supplement to pltffs supplemental answers & objections to second interrogs & request for production.
4-11-77		Filed affdvt of service of copy of deft's reply to pltffs pre-tri memorandum on Gilbert, Segall & Young, 430 Park Ave., NYC 10022, 4-8-77.
4-11-77		Filed affdvt of service of a copy of defts reply to pltffs propos findings of fact & conclusions of law upon, Gilbert Segall & You 430 Park Ave., NYC 10022, on 4-8-77.
4-11-77		Filed defts reply to pltffs proposed findings of fact & conclusio of law.
4-11-77		Filed defts reply to pltffs pre-trial memorandum.

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
DU PONT GLORE FORGAN, et al	A.T. & T.. & U.S.A.	DOCKET NO. 73- PAGE 15 OF

DATE	NR.	PROCEEDINGS
4-12-77		*Filed Transcript of record of proceedings, dated 1-25-77*
4-11-77		Filed pltffs responses to defts proposed findings of fact & co of law.
4-11-77		Filed pltffs reply pre-trial memorandum.
4-21-77		Filed Supplemental Stip & Order re texts of documents marked as indicated.....WEINFELD,J.
5-5-77		Non-Jury Trial begun & Continued.
5-6-77		Trial Continued.
5-9-77		Trial Continued.
5-1077		Trial Continued.
5-11-77		Trial Continued.
5-12-77		Trial Continued & Concluded. Total Trial Days (6). Decision
5-16-77		Filed defts Post-Trial Memorandum.
5-16-77		Filed defts pos-trial proposed findings of fact & conclusions
5-20-77		Filed defts reply to pltffs post-trial proposed findings of f conclusions of law.
5-20-77		Filed defts reply to pltffs post-trial memorandum.
5-24-77		Filed pltffs post-trial memorandum.
5-24-77		Filed pltffs reply post-trial memorandum.
5-24-77		Filed pltffs pos-trial proposed findings of fact & conclusions law.
5-24-77		Filed pltffs responses to defts post-trial proposed findings o & conclusions of law.
7-19-77		Filed pltffs memo in support of the admission into evidence o hibits 15, 16, 17, 110, 111 & 112.
7-19-77		Filed Opinion #46169, Findings of Fact & Conclusions of Law. class action, pltffs seek to recover from (ATT&T) & 23 compani affiliated with it a portion of the federal communications exc taxes which defts collected from pltffs & paid to the U.S. Gov Plttfs claim those taxes were collected by reason of a contrac conspiracy among the defts in restraint of interstate commerce violation of Section 1 of the Sherman Act, & they seek treble etc. Upon the totality of the relevant & probative evidence i case, including the testimony of those witnesses who testified the trial, which the Court accepts as credible, the pltffs hav

Con't on Page #16

WEINFELD,J.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
DU PONT GLORE FORGAN, et al	A.T.&T. & U.S.A.	DOCKET NO 73-2447 PAGE 16 OF ___ PAGES

DATE	NR.	PROCEEDINGS
7-19-77		Con't from Page #15 failed to establish their claim that the defts entered into any conspiracy relating to Centrex rates & they have not shown that the alleged conspiracy constituted an unreasonable restraint of trade, for many of the reasons previously discussed, etc. For the many reasons stated, the complt is dismissed in its entirety upon the merits. The foregoing, together with the facts stipulated in the pretrial order, shall constitute the Court's Findings of Fact & Conclusions of Law.......WEINFELD,J. n/m
8-5-77	–	Filed Transcript of record of proceedings, dated May 5, 6, 9, 10, 1977
8-5-77	–	Filed Transcript of record of proceedings, dated July 11, 12, 1977
8-4-77		Filed Judgment & Order that 3rd-pty deft U.S.A. have judgment again defts & 3rd-pty pltffs dismissing the 3rd-pty complt, with costs to be taxed against defts & 3rd-pty pltffs. Ordered, that defts & 3rd-pty pltffs have judgment against pltffs & the pltff class, such class consisting of all persons who were taxable Centrex customers during the period of 1-1-66 & the effective date in 1971 or 1972, etc., such persons having been given notice be certified mail, pursuant to Court's order ent. 12-10-75 & who did not request exclusio from the pltff class, dismissing the complt in it entirety, with costs to be taxed against the pltffs.....WEINFELD,J. Judgment Ent. 8-5-77, Clerk. n/m
8-18-77		Filed bill of cost docket as Judgment #78,033. Bill of costs as taxed in the sum of $11,053.02 in favor of deft/ A.T.&T as against pltfs-Clerk
9-2-77		Filed pltffs notice of appeal to the USCA from the final judgment entered 8-5-77, dismissing the complt in its entirety on the merits. Copies mailed to: Davis Polk & Wardwell 1 Chase Manhattan Plaza New York, N.Y. 10005 & William M. Tendy 1 St. Andrews Plaza New York, N.Y. 10007 Howard Ives, 430 Park Ave., New York, N.Y. 10022
9-15-77		Filed defts & 3rd-pty pltffs, as indicated notice of appeal to the USCA from the final judgment ent. 8-5-77. Copies sent to: Nickerson Kramer Lowenstein Nessen Kamin & Soll 919 Third Ave., New York, N.Y. 10022 Gilbert Segall & Young 430 Park Ave. New York, N.Y. 10022 William M. Tendy Acting U.S. Attorney 1 St. Andres Plaza New York, N.Y. 10007

Q

SUMMONS IN A CIVIL ACTION

CIV. 1a (2-
merly D.C. Form No.45a Rev. (6-

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

[illegible]

CIVIL ACTION FILE NO. 73 Civ 2447

DUPONT GLORE FORGAN INCORPORATED,
THE HOME INSURANCE COMPANY,
MONSANTO COMPANY,
REYNOLDS SECURITIES, INC.,
SCHENLEY INDUSTRIES, INC.,
and
SWIFT & COMPANY,
On their own behalf and on behalf
of all others similarly situated,

Plaintiffs

v.

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY, et al.

(See Rider for additional defendants)

Defendants

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon DORNBUSH MENSCH MANDELSTAM & SCHWARTZ,

plaintiff's attorneys, whose address is 22 East 40th Street, New York, N.Y. 10016,

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Thomas E. [illegible]
Clerk of Court.

C. [illegible]
Deputy Clerk.

[Seal of Court]

Date: June 1, 1973

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

RIDER - ADDITIONAL DEFENDANTS

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY,

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY
OF MARYLAND,

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY
OF VIRGINIA,

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY
OF WEST VIRGINIA,

CINCINNATI BELL, INC.,

DIAMOND STATE TELEPHONE COMPANY,

ILLINOIS BELL TELEPHONE COMPANY,

INDIANA BELL TELEPHONE COMPANY,

MICHIGAN BELL TELEPHONE COMPANY,

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,

NEW JERSEY BELL TELEPHONE COMPANY,

NEW YORK TELEPHONE COMPANY,

NORTHWESTERN BELL TELEPHONE COMPANY,

THE OHIO BELL TELEPHONE COMPANY,

PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

SOUTH CENTRAL BELL TELEPHONE COMPANY,

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

SOUTHERN NEW ENGLAND TELEPHONE COMPANY,

SOUTHWESTERN BELL TELEPHONE COMPANY,

and

WISCONSIN TELEPHONE COMPANY

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

DUPONT GLORE FORGAN INCORPORATED,

THE HOME INSURANCE COMPANY,

MONSANTO COMPANY,

REYNOLDS SECURITIES, INC.,

SCHENLEY INDUSTRIES, INC.,

and

SWIFT & COMPANY,

On their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,

CINCINNATI BELL, INC.,

DIAMOND STATE TELEPHONE COMPANY,

ILLINOIS BELL TELEPHONE COMPANY,

INDIANA BELL TELEPHONE COMPANY,

MICHIGAN BELL TELEPHONE COMPANY,

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,

Civil Action No. _____

COMPLAINT -- CLASS ACTION

HOGAN & HARTSON
815 CONNECTICUT AVENUE
WASHINGTON, D.C. 20006

NEW JERSEY BELL TELEPHONE COMPANY,

NEW YORK TELEPHONE COMPANY,

NORTHWESTERN BELL TELEPHONE COMPANY,

THE OHIO BELL TELEPHONE COMPANY,

PACIFIC NORTHWEST BELL
TELEPHONE COMPANY,

PACIFIC TELEPHONE AND
TELEGRAPH COMPANY,

SOUTH CENTRAL BELL TELEPHONE COMPANY,

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY,

SOUTHERN NEW ENGLAND TELEPHONE
COMPANY,

SOUTHWESTERN BELL TELEPHONE COMPANY,

and

WISCONSIN TELEPHONE COMPANY,

Defendants.

COMPLAINT

JURISDICTION

1. This class action is brought on behalf of CENTREX users from whom illegal collections of excise taxes were made or caused to be made by defendants in violation of defendants' statutory and common law duties and as a result of a combination, conspiracy, or concert of action among defendants in an attempt to restrain trade and competition and to monopolize the manufacture, production, and sale or lease of P.B.X. systems.

2. This action arises, as hereinafter more fully appears, under §§ 4251-4254 of the Internal Revenue Code of 1954, 26 U.S.C. §§ 4251-4254; and under § 1 and § 2 of the Sherman Act,

15 U.S.C. §§ 1 and 2. The court has jurisdiction over the subject matter under 28 U.S.C. §§ 1331 and 1337; 15 U.S.C. §§ 15 and 22; and the doctrine of pendent jurisdiction. The amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

3. This action involves interstate commerce in that, as alleged herein, the actions of defendants affected interstate commerce and in that the communications systems referred to herein are used in and for interstate commerce.

CLASS ACTION ALLEGATIONS

4. Plaintiffs bring Count I against American Telephone and Telegraph Company ("AT&T") and Counts V and VII against all defendants on their own behalf and on behalf of a class.

A. A Class action is alleged in Counts I, V and VII pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

B. The class consists of all users of CENTREX systems who were customers of an operating telephone company at any time between January 1, 1966 and December 31, 1972, from whom illegal collections of excise taxes were made by the operating telephone companies, as hereinafter more fully appears.

C. Each of the plaintiffs is, and was during the period between January 1, 1966 and December 31, 1972, a user of a CENTREX system. The claims of plaintiffs are typical of the claims of the class and the plaintiffs will therefore fairly and adequately protect the interest of the class.

D. The common questions of fact are: Did such defendants make or cause to be made illegal collection of excise taxes from members of the class? Did they do so as part of an unlawful effort to thwart competition from the interconnect industry?

E. The common questions of law are: Are such defendants liable to the members of the class for the illegally collected excise taxes? Did the actions of such defendants violate the antitrust laws?

F. The class is so numerous that joinder of all members is impracticable. The records of defendants will establish the exact number and identities of the members of the class, and plaintiffs estimate and therefore allege that there are approximately sixteen hundred members.

G. The common questions of law and fact predominate over any questions that may affect the individual members of the class.

H. A class action in Counts I, V and VII is superior to other available methods for the fair and efficient adjudication of these controversies.

5. Plaintiffs bring Count II against AT&T and Counts VI and VIII against all defendants on their own behalf and on behalf of a class.

A. A class action is alleged in Counts II, VI and VIII pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

B. The class consists of all users of CENTREX systems who were customers of an operating telephone company at any time between January 1, 1966 and December 31, 1972, from whom illegal collections of excise taxes were made by the operating telephone companies, as hereinafter more fully appears, including but not limited to those CENTREX users who, similarly to plaintiffs, have filed or will file with the Internal Revenue

Service claims for refund with respect to the illegal collections of excise tax complained of herein or who have consented or will consent to the filing of such a refund claim on their behalf by defendants pursuant to § 6415 of the Internal Revenue Code.

C. Each of the plaintiffs is, and was during the period between January 1, 1966 and December 31, 1972, a user of a CENTREX system. The claims of plaintiffs are typical of the claims of the class and the plaintiffs will therefore fairly and adequately protect the interest of the class.

D. The common questions of fact are: Did such defendants make or cause to be made illegal collections of excise taxes from members of the class? Did they do so as part of an unlawful effort to thwart competition from the interconnect industy?

E. The common questions of law are: Are such defendants liable to the members of the class for the illegally collected excise taxes? Did the actions of the defendants violate the antitrust laws?

F. The class is so numerous that joinder of all members is impracticable. The records of defendants will establish the exact number and identities of the members of the class, and plaintiffs estimate and therefore allege that there are approximately sixteen hundred members.

G. The common questions of law and fact predominate over any questions that may affect the individual members of the class.

H. A class action in Counts II, VI and VIII is superior to other available methods for the fair and efficient adjudication of these controversies.

6. Home, Monsanto, Reynolds and Schenley bring Count III against AT&T and New York Telephone Company ("NYT") on their own behalf and on behalf of a class.

A. A class action is alleged in Count III pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

B. The class consists of all users of CENTREX systems who were customers of NYT at any time between January 1, 1966 and December 31, 1972, from whom illegal collections of excise taxes were made by NYT, as hereinafter more fully appears.

C. Each of Home, Monsanto, Reynolds and Schenley is, and was during the period between January 1, 1966 and December 31, 1972, a customer of NYT and a user of a CENTREX system. The claims of Home, Monsanto, Reynolds and Schenley are typical of the claims of the class and Home, Monsanto, Reynolds and Schenley will therefore fairly and adequately protect the interest of the class.

D. The common question of fact is: Did such defendants make or cause to be made illegal collections of excise taxes from members of the class?

E. The common question of law is: Are such defendants liable to the members of the class for the illegally collected excise taxes?

F. The class is so numerous that joinder of all members is impracticable. The records of defendants will establish the exact number and identities of the members of the class, and Home, Monsanto, Reynolds and Schenley estimate and therefore allege that there are approximately six hundred members.

G. The common questions of law and fact predominate over any questions that may affect the individual members of the class.

H. A class action in Count III is superior to other available methods for the fair and efficient adjudication of these controversies.

7. Home, Monsanto, Reynolds and Schenley bring Count IV against AT&T and NYT on their own behalf and on behalf of a class.

A. A class action is alleged in Count IV pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

B. The class consists of all users of CENTREX systems who were customers of NYT at any time between January 1, 1966 and December 31, 1972, from whom illegal collections of excise taxes were made by NYT, as hereinafter more fully appears, including but not limited to those CENTREX users who, similarly to plaintiffs, have filed or will file with the Internal Revenue Service claims for refund with respect to the illegal collections of excise tax complained of herein or who have consented or will consent to the filing of such a refund claim on their behalf by defendants pursuant to § 6415 of the Internal Revenue Code.

C. Each of Home, Monsanto, Reynolds and Schenley is, and was during the period between January 1, 1966 and December 31, 1972, a customer of NYT and a user of a CENTREX system. The claims of Home, Monsanto, Reynolds and Schenley are typical of the claims of the class and Home, Monsanto, Reynolds and Schenley will therefore fairly and adequately protect the interest of the class.

D. The common question of fact is: Did such defendants make or cause to be made illegal collections of excise taxes from members of the class?

E. The common question [illegible]: Are such defendants liable to the members of [illegible] for the illegally collected excise taxes?

F. The class is so numerous that joinder of all members is impracticable. The records of defendants will establish the exact number and identities of the members of the class, and Home, Monsanto, Reynolds and Schenley estimate and allege that there are approximately six hundred members.

G. The common questions of law and fact predominate over any questions that may affect the individual members of the class.

H. A class action in Count IV is superior to other available methods for the fair and efficient adjudication of these controversies.

CLAIMS

Count I

(Claim By All Plaintiffs Against AT&T)

8. The following are the named plaintiffs to this action.

A. Plaintiff duPont Glore Forgan Incorporated is a corporation organized under the laws of the State of Delaware.

B. Plaintiff Home Insurance Company ("Home") is a corporation organized under the laws of the State of New York.

C. Plaintiff Monsanto Company ("Monsanto") is a corporation organized under the laws of the Sate of Delaware.

D. Plaintiff Reynolds Securities, Inc. ("Reynolds") is a corporation organized under the laws of the State of Delaware.

E. Plaintiff Schenley Industries, Inc. ("Schenley") is a corporation organized under the laws of the State of Delaware.

F. Plaintiff Swift & Company is a corporation organized under the laws of the State of Delaware.

9. AT&T is a corporation organized under the laws of the State of New York.

10. Each of the remaining defendants is engaged in the provision of services for communication by telephone and is a subsidiary of AT&T. The respective states of incorporation and approximate percentage of ownership of such defendants by AT&T are as follows:

Defendant	State of Incorporation	Percentage Ownership by AT&T
The Bell Telephone Company of Pennsylvania	Pennsylvania	100
The Chesapeake and Potomac Telephone Company	New York	100
The Chesapeake and Potomac Telephone Company of Maryland	Maryland	100
The Chesapeake and Potomac Telephone Company of Virginia	Virginia	100
The Chesapeake and Potomac Telephone Company of West Virginia	West Virginia	100
Cincinnati Bell, Inc.	Ohio	27
Diamond State Telephone Company	Delaware	100
Illinois Bell Telephone Company	Illinois	100
Indiana Bell Telephone Company	New York	100
Michigan Bell Telephone Company	Michigan	100
The Mountain States Telephone and Telegraph Company	Colorado	87
New England Telephone and Telegraph Company	New York	70
New Jersey Bell Telephone Company	New Jersey	100
New York Telephone Company	New York	100

Northwestern Bell Telephone Company	Iowa	100
The Ohio Bell Telephone Company	Ohio	100
Pacific Northwest Bell Telephone Company	Washington	90
Pacific Telephone and Telegraph Company	California	90
South Central Bell Telephone Company	Delaware	100
Southern Bell Telephone and Telegraph Company	New York	100
Southern New England Telephone Company	Connecticut	18
Southwestern Bell Telephone Company	Missouri	100
Wisconsin Telephone Company	Wisconsin	100

11. As used herein, the terms listed below shall have the meanings indicated:

A. "Operating telephone company" means a defendant other than AT&T.

B. "Intra-office communication" means the use of those communication services which would come within the definition of "private communication service" as that term is defined in § 4252(d) of the Internal Revenue Code of 1954, 26 U.S.C. § 4252(d), whether or not the separate charge required by that section is made therefor.

C. "Extra-office communication" means the use of those communication services which come within the definitions of "local telephone service" and "toll telephone service" as those terms are defined in § 4252(a) and § 4252(b), respectively, of the Internal Revenue Code.

D. "Switching Equipment" means that equipment which provides the capacity for gaining access to other telephone stations.

E. "Station Equipment" means telephone hand sets and related equipment typically associated with a communication system.

F. "P.B.X. system" is an abbreviation for "private branch exchange system." A P.B.X. system is a system used by a customer of an operating telephone company and which provides that customer with the capabilities to engage both in intra-office communication and in extra-office communication. All the switching equipment and all the station equipment associated with a P.B.X. system, other than a CENTREX system, is located on the premises of the customer and is connected by lines to the local exchange of the operating telephone company. The tariffs filed by the operating telephone companies with the various state and federal regulatory agencies usually reflect separate charges for the equipment services and for the line services associated with P.B.X. systems other than CENTREX systems.

G. "CENTREX" is the trade name for a P.B.X. system provided by defendant AT&T or by companies associated with it. There are two types of CENTREX systems. The switching equipment associated with a CENTREX CO system is located on the premises of the local exchange of the operating telephone company and is connected by lines to the station equipment on the premises of the customer. A CENTREX CU system differs in that the switching equipment and the station equipment are both located on the premises of the customer. Prior to 1973 the tariffs on file with the various state and federal regulatory agencies typically provided for a single charge for CENTREX which included both equipment services and line services.

H. "Interconnect industry" means those manufacturers, not including the defendants or any companies associated with them, engaged in the manufacture, production, and sale or lease of P.B.X. systems other than CENTREX or other P.B.X. systems provided by the defendants or by companies associated with them.

12. A federal excise tax is imposed on communication services by §§ 4251-4254 of the Internal Revenue Code, which sections were substantially amended and revised effective January 1, 1966, by the 1965 Excise Tax Reduction Act, Act of June 21, 1965, P.L. 89-44, 79 Stat. 136 (1965). Section 4251(a) provides that the tax shall be paid on amounts paid for the use of "local telephone service," "toll telephone service," and "teletypewriter exchange service," terms defined in § 4252(a), § 4252(b) and § 4252(c), respectively. Section 4252(a) excludes from the definition of "local telephone service" any service which is a "private communication service" as that term is defined in § 4252(d). Section 4252(d) as amended in 1965 defines "private communication service" as the service and equipment furnished to allow intercommunication among a customer's telephone stations, "except that such term does not include any communication service unless a separate charge is made for such service." (Emphasis added.)

13. CENTREX is within the scope of "private communication service" and thereby is exempt, insofar as it is used for intra-office communication, from the federal excise tax. Section 4252(d)(1)(B) applies to an "inter-communication system for subscriber's stations regardless of whether such * * * intercommunication system may be connected through switching" with the

telephone exchange. (Emphasis added.) Likewise, in including in the definition in § 4252(d)(2) and § 4252(d)(3) "switching capacity * * * necessary or unique to the use of intercommunication systems," in the 1965 Excise Tax Reduction Act, Congress clearly contemplated CENTREX to be within the exemption.

14. The intent of Congress was that all private communication services be treated alike, and that the separation of charges, requisite for the exemption to be applied to CENTREX, be made within a reasonable time. In H.R. Rep. No. 433, 89th Cong., 2d Sess. 31 (1965), the report on the 1965 Excise Tax Reduction Act, the House Committee on Ways and Means stated:

> For the reasons indicated above, your committee's bill provided an exemption from the tax on local telephone service for private communications service if a separate charge is made for this service. It is understood that private lines and PBX systems generally will *immediately* qualify for this exemption. However, it is understood that Centrex systems--where the switching equipment is generally on the premises of the local exchange rather than on that of a subscriber--generally do not, *as yet*, provide for a charge which is separate and distinct from that for local telephone service. *Until* such a separation is made, this exemption, therefore, will not apply in the case of Centrex service. (Emphasis added.)

15. Section 4291 of the Internal Revenue Code requires that the operating telephone companies collect the excise tax on communication services. Plaintiffs and members of the class do not file excise tax returns. They rely upon defendants to calculate and to collect the proper amount of tax due.

16. Defendants have had the capability of making, or causing to be made, the separation of charges required for exemption under § 4252(d) at all times since 1961, but they either willfully or fraudulently or negligently failed to do so until recently, well knowing that the effect of such inaction, after

January 1, 1966, was to require plaintiffs and members of the class to pay greater amounts of excise taxes than they would have been obliged to pay had defendants made, or caused to have been made, the requisite separation of charges on January 1, 1966.

17. The continuing failure of defendants to make, or cause to be made, the required separation of charges constituted a violation of the mandate from Congress that such separation be made within a reasonable time.

18. Amounts collected as excise taxes by the operating telephone companies, constitute, under § 7501 of the Internal Revenue Code, a special fund held in trust for the United States. Certain fiduciary duties are therefore owing from defendants to the United States with respect to excise taxes collected by the operating telephone companies from plaintiffs and class members.

19. The customer, as the user of the communication services is the party liable, under § 4251(a) of the federal excise tax. Customers entrust the money for that tax to the operating telephone companies for the purposes of filing returns and paying the money over to the federal government, and fiduciary duties arise which the defendants owe to their customers. These duties relate not only to the handling of the money, but also to the calculation of the amount due.

20. Interests of the defendants were, however, in conflict with their fiduciary duties owed to plaintiffs and class members. Among these interests were the defendants' concern for competition from the interconnect industry and for their own dealings with the federal government. Had defendants made or caused to have been made the separation of charges earlier, users of P.B.X. systems and members of the interconnect industry would thereby have learned the breakdown between the costs of equipment

services and line services associated with the CENTREX system, which information would have aided members of the interconnect industry to compete more effectively against defendants, as hereinafter more fully appears.

21. In choosing not to make the requisite separation of charges, defendants heeded their own interests and violated their fiduciary duties owed to plaintiffs and class members.

22. Defendants were and are common carriers and public utilities. As such they owe certain statutory and/or common law duties to their customers, among which are: the duty to provide, or cause to be provided, reasonable and adequate service; the duty to provide, or cause to be provided, such service at reasonable, proper and not arbitrarily discriminatory rates; the duty to treat alike, or cause to be treated alike, all customers similarly situated; the duty to provide, or cause to be provided, service at the most favorable rate to which customers are entitled; and the duty to make, or cause to be made, no contract by which their power or ability to provide their service would be impaired.

23. In failing to make, or cause to be made, the required separation of charges defendants violated their statutory and/or common law duties as public utilities and common carriers to plaintiffs and members of the class.

24. The operating telephone companies have each entered into an agreement or contract or course of conduct with AT&T whereby, in return for specified compensation, AT&T has agreed to perform certain managerial and policy-making functions for each of the operating telephone companies. AT&T has thereby assumed the obligation to perform certain duties owed by the operating telephone companies to their customers.

25. When the decision was made to provide the separation of charges to the members of the class, AT&T directed to the

operating telephone companies the method to be used. The decisions when and how to make the separation were made or recommended by AT&T.

26. The duties referred to by defendants in this complaint are among those duties assumed by AT&T by virtue of its course of conduct, its agreements with the operating telephone companies, and its being their parent corporation.

27. In failing to direct the operating telephone companies to make the required separation of charges, AT&T violated its assumed duties owed to plaintiffs and other members of the class.

28. AT&T has been an aider and abetor and a joint wrongdoer with the operating telephone companies in violating the duties owed to plaintiffs and other members of the class as set forth in this complaint.

29. AT&T materially influenced the operating telephone companies to engage in the actions or lack of action, violating the duties owed to plaintiffs and other members of the class as set forth in this complaint.

30. As a direct and proximate result of the wrongful actions by AT&T as set forth in this complaint, the operating telephone companies failed to make the separation of charges as set forth in this complaint. Thus, from January 1, 1966 until recently plaintiffs and members of the class were damaged in that they were required to pay and did pay higher excise taxes than they would have been required to pay had the requisite separation of charges been made on January 1, 1966. The records of defendants will establish the total amount of such damages, and plaintiffs estimate and therefore allege that such damages to the class total approximately fifty million dollars, and the damages to each

named plaintiff far exceed ten thousand dollars, exclusive of interest. But for the failure of the operating telephone companies to make the requisite separation of charges, the intra-office communications of plaintiffs and members of the class would have qualified as uses of private communication services and the charges therefor would have been exempt from tax. However, plaintiffs and all other members of the class they represent were, until recently, charged by and did pay to the operating telephone companies federal excise taxes on both their intra-office and their extra-office communications.

Count II

(Claim By All Plaintiffs Against AT&T)

31. Plaintiffs reallege and incorporate herein paragraphs 8 through 15 of Count I.

32. Section 6415 of the Internal Revenue Code allows the operating telephone companies to file a claim for refund of overcollected excise taxes where they have repaid the taxes to their customers or where they have obtained from their customers the consent to file on behalf of their customers.

33. Although the tax exemption for private communication services was effective January 1, 1966, the operating telephone companies have only recently begun to make a separation of charges on bills to customers and to collect from them excise taxes only on those charges all[illegible]able to extra-office communications. Any delay in tolling those statutes of limitation applicable to claims for refund of overcollected excise taxes which may be running against plaintiffs and members of the class is therefore of great prejudice to plaintiffs and to members of the class.

34. Recently, in providing, or causing to be provided, the separation of charges to their customers, defendants used, or caused the use of, cost data and accounting records available to them since the institution of CENTREX service. The separation of charges requisite to the tax exemption for intra-office communications therefore either actually existed on the books of the defendants or was at all times readily computable from information on the books of the defendants. Plaintiffs and members of the class were at all material times unaware that the separation of charges either actually existed on the books of the defendants or was readily computable from information on the books of defendants.

35. In Revenue Ruling 69-152, 1969-1 C.B. 289, the Internal Revenue Service held that where an operating telephone company maintained a separation of charges on its books but did not reflect such separation in its bills to its customers, those customers were nonetheless entitled to an exemption from the federal excise tax for those charges for private communication service.

36. Since the separation of the charges existed on the books of the defendants, the intra-office communications of plaintiffs and all other members of the class qualified as users of private communication services, effective January 1, 1966. However, until recently, plaintiffs and all other members of the class were charged, or caused to have been charged, federal excise taxes by defendants on both their intra-office and their extra-office communications.

37. Thus, from January 1, 1966 until recently defendants collected, or caused to have been collected, a greater amount in excise taxes from plaintiff and class members than they were entitled to collect, or cause to be collected, under the law, and plaintiffs and members of the class were required to pay and did

pay to the operating telephone companies excise taxes which were not in fact due.

38. Plaintiffs reallege and incorporate herein paragraph 30 of Count I.

Count III

(Claim By Home, Monsanto, Reynolds
And Schenley Against AT&T And NYT)

39. Home, Monsanto, Reynolds and Schenley reallege and incorporate herein paragraphs 8 through 29 of Count I.

40. As a direct and proximate result of the wrongful actions, or lack of action, by defendants, as set forth in this complaint, NYT failed to make the separation of charges as set forth in this complaint. Thus, from January 1, 1966 until recently Home, Monsanto, Reynolds and Schenley and members of the class were damaged in that they were required to pay and did pay higher excise taxes than they would have been required to had the requisite separation of charges been made on January 1, 1966. The records of defendants will establish the total amount of such damages, and Home, Monsanto, Reynolds and Schenley estimate and therefore allege that such damages to the class total approximately thirty million dollars, and the damages to each of Home, Monsanto, Reynolds and Schenley far exceed ten thousand dollars, exclusive of interest. But for the failure of NYT to make the requisite separation of charges, the intra-office communications of Home, Monsanto, Reynolds and Schenley and members of the class would have qualified as uses of private communication services and the charges therefor would have been exempt from tax. However, Home, Monsanto, Reynolds and Schenley and all other members of the class they represent were, until recently, charged by and did pay to NYT federal excise taxes on both their intra-office and their extra-office communications.

Count IV

(Claim By Home, Monsanto, Reynolds, and Schenley
Against AT&T and NYT)

41. Home, Monsanto, Reynolds and Schenley reallege and incorporate herein paragraphs 8 through 15 of Count I.

42. Home, MOnsanto, Reynolds and Schenley reallege and incorporate herein paragraphs 32 through 37 of Count II.

43. Home, Monsanto, Reynolds and Schenley reallege and incorporate herein paragraph 40 of Count III.

Count V

(Claim By All Plaintiffs Against All Defendants)

44. Plaintiffs reallege and incorporate herein paragraphs 8 through 29 of Count I.

45. As a direct and proximate result of the wrongful actions, or lack of action, by defendants, as set forth in this complaint, the operating telephone companies failed to make the separation of charges as set forth in this complaint. Thus, from January 1, 1966 until recently plaintiffs and members of the class were damaged in that they were required to pay and did pay higher excise taxes than they would have been required to had the requisite separation of charges been made on January 1, 1966. The records of defendants will establish the total amount of such damages, and plaintiffs estimate and therefore allege that such damages to the class total approximately fifty million dollars, and the damages to each of the named plaintiffs far exceed ten thousand dollars, exclusive of costs. But for the failure of the operating telephone companies to make the requisite separation of charges, the intra-office communications of plaintiffs and members of the class would have qualified as uses of private communication

services and the charges therefor would have been exempt from tax. However, plaintiffs and all other members of the class they represent were, until recently charged by and did pay to the operating telephone companies federal excise taxes on both their intra-office and their extra-office communications.

Count VI

(Claim By All Plaintiffs Against All Defendants)

46. Plaintiffs reallege and incorporate herein paragraphs 8 through 15 of Count I.

47. Plaintiffs reallege and incorporate herein paragraphs 32 through 37 of Count II.

48. Plaintiffs reallege and incorporate herein paragraph 45 of Count V.

Count VII

(Claim By All Plaintiffs Against All Defendants)

49. Plaintiffs reallege and incorporate herein paragraphs 8 through 29 of Count I.

50. Defendants and companies associated with them face no competition in the provision of CENTREX systems.

51. Defendants and companies associated with them face substantial competition from the interconnect industry in the provision of P.B.X. systems.

52. A customer who chooses to buy or rent a P.B.X. system from a member of the interconnect industry must nonetheless obtain the lines to be used for extra-office communication from the local operating telephone company.

53. It was therefore in the interests of the defendants, with regard to their P.B.X. systems, to maintain high rates for line services and low rates for equipment services.

54. For the defendants to provide the plaintiffs and other members of the class with the separation of charges to which they were entitled would have revealed what should have been the proper allocation between charges for line and equipment services for P.B.X. systems as well, and would therefore have had adverse effects on the defendants' competitive interests with regard to the interconnect industry.

55. The decision to withhold the separation of charges and thereby to deny to the plaintiffs and to all other members of the class the tax exemption on their intra-office communications was part of an effort to thwart competition from the interconnect industry. That decision was the result of a combination, conspiracy or concert of action in New York City and elsewhere among the defendants and of a policy directed to and imposed upon the operating telephone companies by AT&T from New York City and elsewhere.

56. The failure of the operating telephone companies to provide the separation of charges was a result of a combination, conspiracy or concert of action among some or all of the defendants and of a policy directed to the operating telephone companies by AT&T and constituted a violation of 15 U.S.C. § 2, commonly known as § 2 of the Sherman Act, in that it was part of a plan and attempt to monopolize or a conspiracy to monopolize the production and trade in P.B.X. systems.

57. The failure of the operating telephone companies to provide the separation of charges was a result of a combination, conspiracy or concert of action among some or all of the defendants

and of a policy directed to the operating telephone companies by AT&T and constituted a violation of 15 U.S.C. § 1, commonly known as § 1 of the Sherman Act, in that it was a combination, conspiracy or concert of action in restraint of trade.

58. The plaintiffs and all members of the class they represent were damaged in that among the anticompetitive effects of the actions of the defendants was a reduction in effective competition from the interconnect industry. The plaintiffs and all other members of the class they represent would have been able to obtain their CENTREX systems, or other P.B.X. systems, on more competitive terms had the separation of charges been made public and had the users of such systems and the members of the interconnect industry thereby learned of the breakdown on CENTREX systems between the costs of intra-office communications and the costs of extra-office communications. Plaintiffs estimate and therefore allege that such damages to the class total approximately fifty million dollars.

59. As a further direct and proximate result of the wrongful actions or failure of action by defendants, as set forth in this complaint, the operating telephone companies failed to make the separation of charges as set forth in this complaint. Thus, from January 1, 1966 until recently plaintiffs and members of the class were damaged in that they were required to and did pay higher excise taxes than they would have been required to had the requisite separation of charges been made on January 1, 1966. The records of defendants will establish the total amount of such damages, and plaintiffs estimate and therefore allege that such damages to the class total approximately fifty million dollars, and the damages to each of the named plaintiffs far exceed ten thousand dollars, exclusive of costs.

But for the failure of the operating telephone companies to make the requisite separation of charges, the intra-office communications of plaintiffs and members of the class would have qualified as uses of private communication services and the charges therefor would have been exempt from tax. However, plaintiffs and all other members of the class they represent were, until recently, charged by and did pay to the operating telephone companies federal excise taxes on both their intra-office and their extra-office communications.

Count VIII

(Claim By All Plaintiffs Against All Defendants)

60. Plaintiffs reallege and incorporate herein paragraphs 8 through 15 of Count I.

61. Plaintiffs reallege and incorporate herein paragraphs 32 through 37 of Count II.

62. Plaintiffs reallege and incorporate herein paragraphs 50 through 59 of Count VII.

DEMAND FOR JUDGMENT

WHEREFORE, Plaintiffs pray:

On Counts I and II

A. That judgment be entered against AT&T in an amount equal to the difference between the amount of excise taxes paid by plaintiffs and the members of the class and the amount of excise taxes they should have been required to pay, plus interest from the date of each payment of excise taxes on the amount of damages relating to such payment; which payment cannot be precisely ascertained at this time but is believed to be approximately fifty million dollars.

On Counts III and IV

B. That judgment be entered against AT&T and NYT in an amount equal to the difference between the amount of excise taxes paid by plaintiffs and the members of the class and the amount of excise taxes they should have been required to pay, plus interest from the date of each payment of excise taxes on the amount of damages relating to such payments; which amount cannot be precisely ascertained at this time but is believed to be approximately thirty million dollars.

On Counts V and VI

C. That judgment be entered against all defendants in an amount equal to the difference between the amount of excise taxes paid by plaintiffs and the members of the class and the amount of excise taxes they should have been required to pay, plus interest from the date of each payment of excise taxes on the amount of damages relating to such payments; which amount cannot be precisely ascertained at this time but is believed to be approximately fifty million dollars.

On Counts VII and VIII

D. That judgment be entered against all defendants in an amount, as actual damages, equal to the difference between the amount of excise taxes paid by plaintiffs and the members of the class and the amount of excise taxes they should have been required to pay, plus interest from the date of each payment of excise taxes on the amount of damages relating to such payment; which amount cannot be precisely ascertained at this time but is believed to be approximately fifty million dollars.

E. That judgment be entered against all defendants in an amount, as actual damages, equal to the difference between the costs to the plaintiffs and members of the class of their CENTREX systems and the amount of costs they would have borne for such systems had defendant not violated § 1 and/or § 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, which amount cannot be precisely ascertained at this time but is believed to be approximately fifty million dollars.

F. That judgment be entered against all defendants for three-fold the amount of actual damages sustained by plaintiffs and members of the class.

On Counts II, IV, VI, and VIII

G. That the defendants be ordered to notify immediately all present and past users of CENTREX of their rights either to file their own claim for refund or to consent that a claim for refund be filed on their behalf by defendants.

H. That the defendants be ordered to file immediately a claim for refund on behalf of any CENTREX user who consents that defendants so file, and, further, to pursue such claim or claims diligently.

On All Counts

I. That each of the Counts of this Complaint is a proper class action.

J. That judgment be entered for the plaintiff and all members of the class against the defendants for the costs of this action, including a reasonable attorneys' fee.

K. That the plaintiff and all other members of the class have such other and further relief as this Court may deem just and proper.

Respectfully submitted,

HOGAN & HARTSON

By
Sherwin J. Markman

By
Jay E. Ricks

By
R. Clark Wadlow

Attorneys for Plaintiffs

815 Connecticut Avenue, N.W.
Washington, D. C. 20006

DORNBUSH, MENSCH, MANDELSTAM
& SCHWARTZ

By
Allen G. Schwartz

Local counsel

22 East 40th Street
New York, New York 10016

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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DUPONT GLORE FORGAN INCORPORATED, THE HOME INSURANCE COMPANY, MONSANTO COMPANY, REYNOLDS SECURITIES, INC., SCHENLEY INDUSTRIES, INC., and SWIFT & COMPANY, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

-against-

73 Civ. 2447
(EW)

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, CINCINNATI BELL, INC., DIAMOND STATE TELEPHONE COMPANY, ILLINOIS BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY, MICHIGAN BELL TELEPHONE COMPANY, THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, NEW JERSEY BELL TELEPHONE COMPANY, NEW YORK TELEPHONE COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, THE OHIO BELL TELEPHONE COMPANY, PACIFIC NORTHWEST BELL TELEPHONE COMPANY, PACIFIC TELEPHONE AND TELEGRAPH COMPANY, SOUTH CENTRAL BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, SOUTHERN NEW ENGLAND TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, and WISCONSIN TELEPHONE COMPANY,

ANSWER

Defendants.

- x

Defendants, by their attorneys, Davis Polk & Wardwell, for their answer to the complaint herein:

JURISDICTION

1. Deny paragraph 1.

2. Deny paragraph 2, except admit that as to one or more plaintiffs the amount in controversy, exclusive of interest and costs, exceeds $10,000.

3. Deny paragraph 3.

CLASS ACTION ALLEGATIONS

4. A. Deny paragraph 4(A).

4. B. Deny paragraph 4(B).

4. C. Deny paragraph 4(C), except admit that each named plaintiff is, and was during at least part of the period between January 1, 1966 and December 31, 1972, a user of a Centrex system.

4. D. Deny paragraph 4(D).

4. E. Deny paragraph 4(E).

4. F. Deny paragraph 4(F).

4. G. Deny paragraph 4(G).

4. H. Deny paragraph 4(H).

5. A. Deny paragraph 5(A).

5. B. Deny paragraph 5(B).

5. C. Deny paragraph 5(C), except admit that each named plaintiff is, and was during at least part of the period between January 1, 1966 and December 31, 1972, a user of a Centrex system.

5. D. Deny paragraph 5(D).

5. E. Deny paragraph 5(E).

5. F. Deny paragraph 5(F).

5. G. Deny paragraph 5(G).

5. H. Deny paragraph 5(H).

6. A. Deny paragraph 6(A).

6. B. Deny paragraph 6(B).

6. C. Deny paragraph 6(C), except admit that each of plaintiffs Home, Monsanto, Reynolds and Schenley is, and was during at least part of the period between January 1, 1966 and December 31, 1972, a user of a Centrex system.

6. D. Deny paragraph 6(D).

6. E. Deny paragraph 6(E).

6. F. Deny paragraph 6(F).

6. G. Deny paragraph 6(G).

6. H. Deny paragraph 6(H).

7. A. Deny paragraph 7(A).

7. B. Deny paragraph 7(B).

7. C. Deny paragraph 7(C), except admit that each of plaintiffs Home, Monsanto, Reynolds and Schenley is, and was during at least part of the period between January 1, 1966 and December 31, 1972, a user of a Centrex system and a customer of defendant New York Telephone Company.

7. D. Deny paragraph 7(D).

7. E. Deny paragraph 7(E).

7. F. Deny paragraph 7(F).

7. G. Deny paragraph 7(G).

7. H. Deny paragraph 7(H).

CLAIMS

Count I

8. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 8.

9. Admit paragraph 9.

10. Admit paragraph 10, except deny that Cincinnati Bell, Inc. and Southern New England Telephone Company are subsidiaries of AT&T, and allege that Indiana Bell Telephone Company is an Indiana corporation, that AT&T's ownership of Illinois Bell Telephone Company is approximately 99.3%, and that AT&T's ownership of New England Telephone and Telegraph Company is approximately 85%.

11. A. Admit paragraph 11(A).

11. B. Deny paragraph 11(B), except admit that the term "intra-office communication" is used in the Complaint as defined in paragraph 11(B).

11. C. Deny paragraph 11(C), except admit that the term "extra-office communication" is used in the Complaint as defined in paragraph 11(C).

11. D. Admit paragraph 11(D).

11. E. Admit paragraph 11(E).

11. F. Deny paragraph 11(F), except admit that a private branch exchange ("P.B.X.") is a system which permits P.B.X. stations to communicate with each other and with other telephone subscribers, that switching equipment associated with a P.B.X. system other than a Centrex system may be located on or off the customer's premises, that P.B.X. tariffs are filed with State and local but not

Federal regulatory agencies, and that some P.B.X. tariffs reflect separate charges for equipment and line services.

11. G. Deny paragraph 11(G), except admit that the defendant operating telephone companies furnish Centrex service, that Centrex CU service differs from Centrex CO service in that the switching equipment is located on the customer's premises, and that during 1971 and 1972 defendant operating telephone companies filed revised tariffs for Centrex service, separating the charges for exchange access and for intercommunication, which have now gone into effect.

11. H. Deny paragraph 11(H), except admit that the term "interconnect industry" is used in the Complaint as defined in paragraph 11(H).

12. Deny paragraph 12, except refer to Sections 4251-4254 of the Internal Revenue Code, as amended by the Excise Tax Reduction Act of 1965, 79 Stat. 136 (1965), for the terms and effect thereof.

13. Deny paragraph 13, except refer to Section 4252(d) of the Internal Revenue Code for the terms and effect thereof.

14. Deny paragraph 14, except refer to H.R. Rep. No. 433, 89th Cong., 2d Sess. 31 (1965) for the terms and effect thereof.

15. Lack knowledge or information sufficient to form a belief as to the truth of paragraph 15, except refer to Section 4291 of the Internal Revenue Code for the terms and effect thereof.

16. Deny paragraph 16.

17. Deny paragraph 17.

18. Deny paragraph 18, except refer to Section 7501 of the Internal Revenue Code for the terms and effect thereof.

19. Deny paragraph 19, except refer to Section 4251(a) of the Internal Revenue Code for the terms and effect thereof.

20. Deny paragraph 20.

21. Deny paragraph 21.

22. Deny paragraph 22, except admit that each of the defendants renders telephone service pursuant to Title II of the Communications Act of 1934, 47 U.S.C. §§ 201-23, and that the defendant operating telephone companies render telephone service pursuant to the laws of the States within which they render such service, and refer to such Act and laws for the terms and effect thereof.

23. Deny paragraph 23.

24. Deny paragraph 24, except admit that each of the defendant operating telephone companies has entered into a License Contract with AT&T, and refer to such License Contracts for the terms and effect thereof.

25. Deny paragraph 25, except admit that AT&T recommended the separation of charges for exchange access and for intercommunication in tariffs for Centrex service, and recommended methods for making such separation.

26. Deny paragraph 26.

27. Deny paragraph 27.

28. Deny paragraph 28.

29. Deny paragraph 29.

30. Deny paragraph 30, except admit that before revised tariffs for Centrex service became effective, separating the charges for exchange access and for inter-

communication, defendant operating telephone companies collected and paid over to the Internal Revenue Service federal excise taxes on the total charges for Centrex service (which charges covered exchange access line usage and unrestricted station usage).

Count II

31. Repeat paragraphs 8 through 17 of this Answer.

32. Deny paragraph 32, except refer to Section 6415 of the Internal Revenue Code for the terms and effect thereof.

33. Deny paragraph 33, except admit that during 1971 and 1972 defendant operating telephone companies filed revised tariffs for Centrex service, separating the charges for exchange access and for intercommunication, which have now gone into effect, that before the revised Centrex tariffs became effective defendant operating telephone companies collected and paid over to the Internal Revenue Service federal excise taxes on the total charges for Centrex service (which charges covered exchange access line usage and unrestricted station usage), and that after such revised tariffs became effective defendant operating telephone companies collected and paid over to the Internal Revenue Service federal excise taxes on the exchange access charges for Centrex service.

34. Deny paragraph 34.

35. Deny paragraph 35, except refer to Revenue Ruling 69-152, 69-1 Cum. Bull. 289, for the terms and effect thereof.

36. Deny paragraph 36, except admit that during 1971 and 1972 defendant operating telephone companies filed revised tariffs for Centrex service, separating the charges for exchange access and for intercommunication, which have now gone into effect, that before the revised Centrex tariffs became effective defendant operating telephone companies collected and paid over to the Internal Revenue Service federal excise taxes on the total charges for Centrex service (which charges covered exchange access line usage and unrestricted station usage), and that after such revised tariffs became effective defendant operating telephone companies collected and paid over to the Internal Revenue Service federal excise taxes on the exchange access charges for Centrex service.

37. Deny paragraph 37.

38. Repeat paragraph 30 of this Answer.

Count III

39. Repeat paragraphs 8 through 29 of this Answer.

40. Deny paragraph 40, except admit that defendant New York Telephone Company filed revised tariffs for Centrex service, separating the charges for exchange access and for intercommunication, which went into effect on August 1, 1972, that before the revised Centrex tariffs became effective defendant New York Telephone Company collected and paid over to the Internal Revenue Service federal excise taxes on the total charges for Centrex service (which charges covered exchange access line usage and unrestricted station usage), and that after such

revised tariffs became effective defendant New York Telephone Company collected and paid over to the Internal Revenue Service federal excise taxes on the exchange access charges for Centrex service.

Count IV

41. Repeat paragraphs 8 through 15 of this Answer.

42. Repeat paragraphs 32 through 37 of this Answer.

43. Repeat paragraph 40 of this Answer.

Count V

44. Repeat paragraphs 8 through 29 of this Answer.

45. Deny paragraph 45, except admit that during 1971 and 1972 defendant operating telephone companies filed revised tariffs for Centrex service, separating the charges for exchange access and for intercommunication, which have now gone into effect, that before the revised Centrex tariffs became effective defendant operating telephone companies collected and paid over to the Internal Revenue Service federal excise taxes on the total charges for Centrex service (which charges covered exchange access line usage and unrestricted station usage), and that after such revised tariffs became effective defendant operating telephone companies collected and paid over to the Internal Revenue Service federal excise taxes on the exchange access charges for Centrex service.

Count VI

46. Repeat paragraphs 8 through 15 of this Answer.

47. Repeat paragraphs 32 through 37 of this Answer.

48. Repeat paragraph 45 of this Answer.

Count VII

49. Repeat paragraphs 8 through 29 of this Answer.

50. Deny paragraph 50.

51. Admit paragraph 51.

52. Admit paragraph 52.

53. Deny paragraph 53.

54. Deny paragraph 54.

55. Deny paragraph 55.

56. Deny paragraph 56.

57. Deny paragraph 57.

58. Deny paragraph 58.

59. Deny paragraph 59, except admit that during 1971 and 1972 defendant operating telephone companies filed revised tariffs for Centrex service, separating the charges for exchange access and for intercommunication, which have now gone into effect, that before the revised Centrex tariffs became effective defendant operating telephone companies collected and paid over to the Internal Revenue Service federal excise taxes on the total charges for Centrex service (which charges covered exchange access line usage and unrestricted station usage), and that after such revised tariffs became effective defendant operating

telephone companies collected and paid over to the Internal Revenue Service federal excise taxes on the exchange access charges for Centrex service.

Count VIII

60. Repeat paragraphs 8 through 15 of this Answer.

61. Repeat paragraphs 32 through 37 of this Answer.

62. Repeat paragraphs 50 through 59 of this Answer.

First Affirmative Defense

63. The Court does not have jurisdiction over the subject matter of this action.

Second Affirmative Defense

64. Except for defendants American Telephone and Telegraph Company and New York Telephone Company, which do business in this District, and The Chesapeake and Potomac Telephone Company, New England Telephone and Telegraph Company, and Southern Bell Telephone and Telegraph Company, which are incorporated in the State of New York, the defendants are neither incorporated nor licensed to do business nor doing business in this District. Except for the claims against defendant New York Telephone Company, none of the claims asserted in the Complaint arose in this District. The venue of this action is therefore improper.

Third Affirmative Defense

65. The Complaint fails to state a claim upon which relief can be granted.

Fourth Affirmative Defense

66. At all times defendant operating companies have rendered Centrex service in accordance with tariffs filed with the appropriate regulatory agencies, and have been required to collect from all subscribers the charges for Centrex service set forth in such tariffs. None of the plaintiffs has requested any regulatory commission with which tariffs for Centrex service have been filed by the defendant operating companies to determine that such tariffs should be revised or should have been revised to separate the charges for Centrex service into charges for exchange access and for intercommunication.

Fifth Affirmative Defense

67. The claims alleged in the Complaint are barred in whole or in part by the applicable statute or statutes of limitations.

Sixth Affirmative Defense

68. The claims alleged in the Complaint are barred in whole or in part by laches.

Seventh Affirmative Defense

69. The theories of liability asserted by plaintiffs are novel and should not be employed as a retrospective basis for holding defendants liable to plaintiffs

for federal excise taxes which defendants have paid over to the Internal Revenue Service.

Eighth Affirmative Defense

70. The defendant operating telephone companies collected federal excise taxes with respect to Centrex service as agents for the United States, not for plaintiffs, and defendants are not proper parties defendant.

Ninth Affirmative Defense to Counts II, IV, VI, and VIII

71. The United States is an indispensable party defendant, and defendants are not proper parties defendant.

Tenth Affirmative Defense to Counts II, IV, VI and VIII

72. Upon information and belief, plaintiffs have not filed with the Internal Revenue Service a claim for refund of federal excise taxes with respect to Centrex service.

Eleventh Affirmative Defense to Counts VII and VIII

73. Plaintiffs are not within the areas of competitive injury of the purported violations of the antitrust laws alleged by plaintiffs.

WHEREFORE, defendants demand judgment against plaintiffs dismissing the Complaint, together with the costs and disbursements of this action.

Dated: New York, New York
June 25, 1973

DAVIS POLK & WARDWELL

By____________________
A Member of the Firm

1 Chase Manhattan Plaza
New York, New York 10005
HA 2-3400

Attorneys for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

-against-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Third-Party Defendant.

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73 Civ. 2447 (EW)

THIRD-PARTY COMPLAINT

The defendants and third-party plaintiffs listed in paragraph 1 below, by their attorneys, Davis Polk & Wardwell, for their Third-Party Complaint herein allege:

1. Defendant and third-party plaintiff American Telephone and Telegraph Company is a corporation organized and existing under the laws of the State of New York. The remaining defendants and third-party plaintiffs (the "defendant operating companies") are corporations organized and existing under the laws of the following states:

Defendant Operating Company	State of Incorporation
The Bell Telephone Company of Pennsylvania	Pennsylvania
The Chesapeake and Potomac Telephone Company	New York
The Chesapeake and Potomac Telephone Company of Maryland	Maryland
The Chesapeake and Potomac Telephone Company of Virginia	Virginia

Defendant Operating Company	State of Incorporation
The Chesapeake and Potomac Telephone Company of West Virginia	West Virginia
Cincinnati Bell, Inc.	Ohio
Diamond State Telephone Company	Delaware
Illinois Bell Telephone Company	Illinois
Indiana Bell Telephone Company	Indiana
Michigan Bell Telephone Company	Michigan
The Mountain States Telephone and Telegraph Company	Colorado
New England Telephone and Telegraph Company	New York
New Jersey Bell Telephone Company	New Jersey
New York Telephone Company	New York
Northwestern Bell Telephone Company	Iowa
The Ohio Bell Telephone Company	Ohio
Pacific Northwest Bell Telephone Company	Washington
The Pacific Telephone and Telegraph Company	California
South Central Bell Telephone Company	Delaware
Southern Bell Telephone and Telegraph Company	New York
The Southern New England Telephone Company	Connecticut
Southwestern Bell Telephone Company	Missouri
Wisconsin Telephone Company	Wisconsin

2. The third-party defendant is the United States of America.

3. Plaintiffs, individually and on behalf of all others similarly situated, filed their Complaint on June 1, 1973. A copy of the Complaint, which is incorporated herein by reference, is annexed as Exhibit A. Defendants served their Answer to the Complaint on June 25, 1973. A copy of the Answer is annexed as Exhibit B.

4. The damages demanded in Counts I, II, III, IV, V, and VI of the Complaint represent the amount of certain Federal telephone excise taxes which were collected by the defendant operating companies and paid over to the United States of America. The defendant operating companies were required by law to act, and did act, as agents and fiduciaries for the United States of America in collecting such taxes and paying them over to the United States of America.

5. The United States of America is liable to defendants and third-party plaintiffs for any amount for which the defendants and third-party plaintiffs may be held liable to any of the plaintiffs, or to any of the persons whom plaintiffs claim to represent, under Count I, II, III, IV, V, or VI of the Complaint in the present action.

6. Each of the defendant operating companies has filed, more than six months prior to the date hereof, claims for refund with the Internal Revenue Service seeking the relief sought in the present Third-Party Complaint. The Internal Revenue Service has not allowed any of such claims for refund, nor has it given notice of disallowance of any of such claims more than two years prior to the date hereof.

WHEREFORE defendants and third-party plaintiffs demand judgment against third-party defendant the United States of America for all sums that may be adjudged in favor of any of the plaintiffs, or in favor of any of the persons whom plaintiffs claim to represent, against any of the defendants and third-party plaintiffs under Count I, II, III IV, V, or VI of the Complaint in the present action, together with costs and disbursements.

Dated: New York, New York
October 1, 1974

DAVIS POLK & WARDWELL

By
A Member of the Firm

1 Chase Manhattan Plaza
New York, New York 10005
HA 2-3400

Attorneys for Defendants and
Third-Party Plaintiffs

DPL:eb
74-3062

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

DUPONT GLORE FORGAN INCORPORATED, :
et al.,

Plaintiffs, :

- v - :

ANSWER

AMERICAN TELEPHONE AND
TELEGRAPH CORPORATION, et al., : 73 Civ. 2447
(EW)

Defendants and :
Third-Party Plaintiffs,

- v - :

UNITED STATES OF AMERICA, :

Third-Party Defendant.
:

- - - - - - - - - - - - - - - - - - - x

The third-party defendant, United States of America, by its attorney, Paul J. Curran, United States Attorney for the Southern District of New York, for its answer to the third-party complaint states:

1. Admits the averments set forth in paragraphs 1, 2, and 3.

2. As to the multiple averments set forth in paragraph 4, (a) denies that the damages demanded in the complaint represent the amount of certain federal telephone excise taxes, and respectfully refers to the averments of the complaint for the nature of the damages sought, (b) lacks knowledge or information sufficient to form a belief as to the truth of the averment that certain federal excise taxes were collected from plaintiff by the defendants and

turned over to the United States, and (c) admits that the defendants were required by law to collect and turn over to the United States certain federal telephone excise taxes, but denies that defendants were agents and fiduciaries of the United States for that purpose.

3. Denies the averments set forth in paragraph 5.

4. Lacks knowledge or information sufficient to form a belief as to the truth of the averments set forth in paragraph 6.

5. For its first defense, that this Court is without subject matter jurisdiction.

6. For its second defense, that the doctrine of sovereign immunity bars recovery.

7. For its third defense, that impleader was improperly invoked.

8. For its fourth defense, that neither the complaint nor the third-party complaint state any claim for relief against the United States.

9. For its fifth defense, that to the extent the third-party complaint seeks to recover overpaid taxes, states that no taxes were overpaid; but if taxes were overpaid, states that no claim for refund was duly and timely filed.

DPL:eb
74-3062

10. For its sixth defense, that to the extent the third-party complaint seeks to recover damages on account of tortious conduct, states that the United States committed no tortious conduct; but if tortious conduct was committed, states that no administrative claim was duly and timely filed and also that the United States is immune from liability on account of such tortious conduct.

11. For its seventh defense, that to the extent the third-party complaint seeks to recover damages or other amounts on account of an express or implied contract with the United States, states that this Court lacks subject matter jurisdiction.

12. For its eighth defense, that the statute of limitations bars recovery.

13. For its ninth defense, that maintenance of this action as a class action is improper.

Dated: New York, New York
January 31, 1975

Yours, etc.,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York,
Attorney for Third-Party Defendant,
United States of America

By: /s/
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IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

DUPONT GLORE FORGAN INCORPORATED,

THE HOME INSURANCE COMPANY,

MONSANTO COMPANY,

REYNOLDS SECURITIES, INC.,

SCHENLEY INDUSTRIES, INC.,

and

SWIFT & COMPANY,

On their own behalf and on behalf
of all others similarly situated,

Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,

CINCINNATI BELL, INC.,

DIAMOND STATE TELEPHONE COMPANY,

ILLINOIS BELL TELEPHONE COMPANY,

INDIANA BELL TELEPHONE COMPANY,

MICHIGAN BELL TELEPHONE COMPANY,

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,

73 Civ. 2447 (EW)

COMPLAINT -- CLASS ACTION
[MARKED PLEADINGS]

NEW JERSEY BELL TELEPHONE COMPANY,

NEW YORK TELEPHONE COMPANY,

NORTHWESTERN BELL TELEPHONE COMPANY,

THE OHIO BELL TELEPHONE COMPANY,

PACIFIC NORTHWEST BELL TELEPHONE
COMPANY,

PACIFIC TELEPHONE AND TELEGRAPH
COMPANY,

SOUTH CENTRAL BELL TELEPHONE
COMPANY,

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY,

SOUTHERN NEW ENGLAND TELEPHONE
COMPANY,

SOUTHWESTERN BELL TELEPHONE
COMPANY,

and

WISCONSIN TELEPHONE COMPANY,

Defendants.

COMPLAINT

JURISDICTION

Deny;
withdrawn
[ ]*

1. This class action is brought on behalf of CENTREX users from whom illegal collections of excise taxes were made or caused to be made by defendants in violation of defendants' statutory and common law duties and as a result of a combination, conspiracy, or concert of action among defendants in an attempt to restrain trade and competition [and to monopolize the manufacture, production, and sale or lease of P.B.X. systems].

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*Each paragraph of the Complaint has been marked to indicate the response of the defendants, the dismissal in the Court's opinion and order of March 23, 1977 of the count to which such paragraph refers or the withdrawal by the plaintiffs of such allegations. As provided in Paragraph II of the Pre-Trial Order dated February 28, 1977, all pleadings have been deemed amended to conform to the issues and factual contentions set forth in Appendices A-D of that Order.

Deny, except admit amount in controversy as to one or more plaintiffs; withdrawn [ ]

2. This action arises, as hereinafter more fully appears, under §§ 4251-4254 of the Internal Revenue Code of 1954, 26 U.S.C. §§ 4251-4254; and under § 1 [and § 2] of the Sherman Act, 15 U.S.C. §[§] 1 [and 2]. The court has jurisdiction over the subject matter under 28 U.S.C. §§ 1331 and 1337; 15 U.S.C. §[§] 15 and [22; and the doctrine of pendent jurisdiction]. The amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

Deny

3. This action involves interstate commerce in that, as alleged herein, the actions of defendants affected interstate commerce and in that the communications systems referred to herein are used in and for interstate commerce.

CLASS ACTION ALLEGATIONS

4. Plaintiffs bring Count I against American Telephone and Telegraph Company ("AT&T") and Counts V and VII against all defendants on their own behalf and on behalf of a class.

Deny

A. A Class action is alleged in Counts I, V and VII pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

Deny

B. The class consists of all users of CENTREX systems who were customers of an operating telephone company at any time between January 1, 1966 and December 31, 1972, from whom illegal collections of excise taxes were made by the operating telephone companies, as hereinafter more fully appears.

Deny in part, admit in part

C. Each of the plaintiffs is, and was during the period between January 1, 1966 and December 31, 1972, a user of a CENTREX system. The claims of plaintiffs are typical of the claims of the class and the plaintiffs will therefore fairly and adequately protect the interest of the class.

Deny;
withdrawn
[ ]

D. The common questions of fact are: Did such defendants make or cause to be made illegal collection of excise taxes from members of the class? [Did they do so as part of an unlawful effort to thwart competition from the interconnect industry?]

Deny

E. The common questions of law are: Are such defendants liable to the members of the class for the illegally collected excise taxes? Did the actions of such defendants violate the antitrust laws?

Deny

F. The class is so numerous that joinder of all members is impracticable. The records of defendants will establish the exact number and identities of the members of the class, and plaintiffs estimate and therefore allege that there are approximately sixteen hundred members.

Deny

G. The common questions of law and fact predominate over any questions that may affect the individual members of the class.

Deny

H. A class action in Counts I, V and VII is superior to other available methods for the fair and efficient adjudication of these controversies.

Dismissed
[ ]

5. Plaintiffs bring Count [II against AT&T and Counts VI and] VIII against all defendants on their own behalf and on behalf of a class.

Deny;
dismissed
[ ]

A. A class action is alleged in Count[s II, VI and] VIII pursuant to Rule 23 (b)(3) of the Federal Rules of Civil Procedure.

Deny

B. The class consists of all users of CENTREX systems who were customers of an operating telephone company at any time between January 1, 1966 and December 31, 1972, from whom illegal collections of excise taxes were made by the operating telephone companies, as hereinafter more fully appears, including but not limited to those CENTREX users who, similarly to plaintiffs, have filed or will file with the Internal Revenue Service claims for refund with respect to the illegal collections of excise tax complained of herein or who have consented or will consent to the filing of such a refund claim on their behalf by defendants pursuant to § 6415 of the Internal Revenue Code.

Deny in part, admit in part

C. Each of the plaintiffs is, and was during the period between January 1, 1966 and December 31, 1972, a user of a CENTREX system. The claims of plaintiffs are typical of the claims of the class and the plaintiffs will therefore fairly and adequately protect the interest of the class.

Deny; withdrawn [ ]

D. The common questions of fact are: Did such defendants make or cause to be made illegal collections of excise taxes from members of the class? [Did they do so as part of an unlawful effort to thwart competition from the interconnect industry?]

Deny

E. The common questions of law are: Are such defendants liable to the members of the class for the illegally collected excise taxes? Did the actions of the defendants violate the antitrust laws?

Deny

F. The class is so numerous that joinder of all members is impractical. The records of defendants will establish the exact number and identities of the members of the class, and plaintiffs estimate and therefore allege that there are approximately sixteen hundred members.

Deny

G. The common questions of law and fact predominate over any questions that may affect the individual members of the class.

Deny; dismissed [ ]

H. A class action in Count[s II, VI and] VIII is superior to other available methods for the fair and efficient adjudication of these controversies.

6. Home, Monsanto, Reynolds and Schenley bring Count III against AT&T and New York Telephone Company ("NYT") on their own behalf and on behalf of a class.

Deny

A. A class action is alleged in Count III pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

Deny

B. The class consists of all users of CENTREX systems who were customers of NYT at any time between January 1, 1966 and December 31, 1972, from whom illegal collections of excise taxes were made by NYT, as hereinafter more fully appears.

Deny in part, admit in part

C. Each of Home, Monsanto, Reynolds and Schenley is, and was during the period between January 1, 1966 and December 31, 1972, a customer of NYT and a user of a CENTREX system. The claims of Home, Monsanto, Reynolds and Schenley are typical of the claims of the class and Home, Monsanto, Reynolds and Schenley will therefore fairly and adequately protect the interest of the class.

Deny

D. The common question of fact is: Did such defendants make or cause to be made illegal collections of excise taxes from members of the class?

Deny

E. The common question of law is: Are such defendants liable to the members of the class for the illegally collected excise taxes?

Deny

F. The class is so numerous that joinder of all members is impracticable. The records of defendants will establish the exact number and identities of the members of the class, and Home, Monsanto, Reynolds and Schenley estimate and therefore allege that there are approximately six hundred members.

Deny

G. The common questions of law and fact predominate over any questions that may affect the individual members of the class.

Deny

H. A class action in Count III is superior to other available methods for the fair and efficient adjudication of these controversies.

7. Home, Monsanto, Reynolds and Schenley bring Count IV against AT&T and NYT on their own behalf and on behalf of a class.

Dismissed

A. A class action is alleged in Count IV pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

Dismissed

B. The class consists of all users of CENTREX systems who were customers of NYT at any time between January 1, 1966 and December 31, 1972, from whom illegal collections of excise taxes were made by NYT, as hereinafter more fully appears, including but not limited to those CENTREX users who, similarly to plaintiffs, have filed or will file with the Internal Revenue Service claims for refund with respect to the illegal collections of excise tax complained of herein or who have consented or will consent to the filing of such a refund claim on their behalf by defendants pursuant to § 6415 of the Internal Revenue Code.

Dismissed

C. Each of Home, Monsanto, Reynolds and Schenley is, and was during the period between January 1, 1966 and December 31, 1972, a customer of NYT and a user of a CENTREX system. The claims of Home, Monsanto, Reynolds and Schenley are typical of the claims of the class and Home, Monsanto, Reynolds and Schenley will therefore fairly and adequately protect the interest of the class.

Dismissed

D. The common question of fact is: Did such defendants make or cause to be made illegal collections of excise taxes from members of the class?

Dismissed

E. The common question of law is: Are such defendants liable to the members of the class for the illegally collected excise taxes?

Dismissed

F. The class is so numerous that joinder of all members is impracticable. The records of defendants will establish the exact number and identities of the members of the class, and Home, Monsanto, Reynolds and Schenley estimate and allege that there are approximately six hundred members.

Dismissed

G. The common questions of law and fact predominate over any questions that may affect the individual members of the class.

Dismissed

H. A class action in Count IV is superior to other available methods for the fair and efficient adjudication of these controversies.

CLAIMS

Count I

(Claim by All Plaintiffs Against AT&T)

8. The following are the named plaintiffs to this action.

Withdrawn

A. Plaintiff duPont Glore Forgan Incorporated is a corporation organized under the laws of the State of Delaware.

Withdrawn

B. Plaintiff Home Insurance Company ("Home") is a corporation organized under the laws of the State of New York.

Deny knowledge or information

C. Plaintiff Monsanto Company ("Monsanto") is a corporation organized under the laws of the State of Delaware.

Deny knowledge or information

D. Plaintiff Reynolds Securities, Inc. ("Reynolds") is a corporation organized under the laws of the State of Delaware.

Deny knowledge or information

E. Plaintiff Schenley Industries, Inc. ("Schenley") is a corporation organized under the laws of the State of Delaware.

Withdrawn

F. Plaintiff Swift & Company is a corporation organized under the laws of the State of Delaware.

Admit

9. AT&T is a corporation organized under the laws of the State of New York.

Deny in part, admit in part

10. Each of the remaining defendants is engaged in the provision of services for communication by telephone and is a subsidiary of AT&T. The respective states of incorporation and approximate percentage of ownership of such defendants by AT&T are as follows:

Defendant	State of Incorporation	Percentage Ownership by AT&T
The Bell Telephone Company of Pennsylvania	Pennsylvania	100
The Chesapeake and Potomac Telephone Company	New York	100
The Chesapeake and Potomac Telephone Company of Maryland	Maryland	100
The Chesapeake and Potomac Telephone Company of Virginia	Virginia	100
The Chesapeake and Potomac Telephone Company of West Virginia	West Virginia	100
Cincinnati Bell, Inc.	Ohio	27
Diamond State Telephone Company	Delaware	100
Illinois Bell Telephone Company	Illinois	100
Indiana Bell Telephone Company	New York	100
Michigan Bell Telephone Company	Michigan	100
The Mountain States Telephone and Telegraph Company	Colorado	87
New England Telephone and Telegraph Company	New York	70
New Jersey Bell Telephone Company	New Jersey	100
New York Telephone Company	New York	100

Northwestern Bell Telephone Company	Iowa	100
The Ohio Bell Telephone Company	Ohio	100
Pacific Northwest Bell Telephone Company	Washington	90
Pacific Telephone and Telegraph Company	California	90
South Central Bell Telephone Company	Delaware	100
Southern Bell Telephone and Telegraph Company	New York	100
Southern New England Telephone Company	Connecticut	18
Southwestern Bell Telephone Company	Missouri	100
Wisconsin Telephone Company	Wisconsin	100

11. As used herein, the terms listed below shall have the meanings indicated:

Admit A. "Operating telephone company" means a defendant other than AT&T.

Deny B. "Intra-office communication" means the use of those communication services which would come within the definition of "private communication service" as that term is defined in § 4252(d) of the Internal Revenue Code of 1954, 26 U.S.C. § 4252(d), whether or not the separate charge required by that section is made therefor.

Deny C. "Extra-office communication" means the use of those communication services which come within the definitions of "local telephone service" and "toll telephone service" as those terms are defined in § 4252(a) and § 4252(b), respectively, of the Internal Revenue Code.

Admit

D. "Switching Equipment" means that equipment which provides the capacity for gaining access to other telephone stations.

Admit

E. "Station Equipment" means telephone hand sets and related equipment typically associated with a communication system.

Deny, except as rephrased

F. "P.B.X. system" is an abbreviation for "private branch exchange system." A P.B.X. system is a system used by a customer of an operating telephone company and which provides that customer with the capabilities to engage both in intra-office communication and in extra-office communication. All the switching equipment and all the station equipment associated with a P.B.X. system, other than a CENTREX system, is located on the premises of the customer and is connected by lines to the local exchange of the operating telephone company. The tariffs filed by the operating telephone companies with the various state and federal regulatory agencies usually reflect separate charges for the equipment services and for the line services associated with P.B.X. systems other than CENTREX systems.

Deny, except as rephrased

G. "CENTREX" is the trade name for a P.B.X. system provided by defendant AT&T or by companies associated with it. There are two types of CENTREX systems. The switching equipment associated with a CENTREX CO system is located on the premises of the local exchange of the operating telephone company and is connected by lines to the station equipment on the premises of the customer. A CENTREX CU system differs in that the switching equipment and the station equipment are both located on the premises of the customer. Prior to 1973 the tariffs on file with the various state and federal regulatory agencies typically provided for a single charge for CENTREX which included both equipment services and line services.

Withdrawn

H. "Interconnect industry" means those manufacturers, not including the defendants or any companies associated with them, engaged in the manufacture, production, and sale or lease of P.B.X. systems other than CENTREX or other P.B.X. systems provided by the defendants or by companies associated with them.

Deny, refer to statute

12. A federal excise tax is imposed on communication services by §§ 4251-4254 of the Internal Revenue Code, which sections were substantially amended and revised effective January 1, 1966, by the 1965 Excise Tax Reduction Act, Act of June 21, 1965, P.L. 89-44, 79 Stat. 136 (1965). Section 4251(a) provides that the tax shall be paid on amounts paid for the use of "local telephone service," "toll telephone service," and "teletypewriter exchange service," terms defined in § 4252(a), § 4252(b) and § 4252(c), respectively. Section 4252(a) excludes from the definition of "local telephone service" any service which is a "private communication service" as that term is defined in § 4252(d). Section 4252(d) as amended in 1965 defines "private communication service" as the service and equipment furnished to allow intercommunication among a customer's telephone stations, "except that such term does not include any communication service unless a separate charge is made for such service." (Emphasis added.)

Deny, refer to statute

13. CENTREX is within the scope of "private communication service" and thereby is exempt, insofar as it is used for intra-office communication, from the federal excise tax. Section 4252(d)(1)(B) applies to an "inter-communication system for subscriber's stations regardless of whether such * * * inte -communication system may be connected through switching" with the

telephone exchange. (Emphasis added.) Likewise, in including in the definition in § 4252(d)(2) and § 4252(d)(3) "switching capacity * * * necessary or unique to the use of intercommunication systems," in the 1965 Excise Tax Reduction Act, Congress clearly contemplated CENTREX to be within the exemption.

Deny, refer to Report

14. The intent of Congress was that all private communication services be treated alike, and that the separation of charges, requisite for the exemption to be applied to CENTREX, be made within a reasonable time. In H.R. Rep. No. 433, 89th Cong., 2d Sess. 31 (1965), the report on the 1965 Excise Tax Reduction Act, the House Committee on Ways and Means stated:

> For the reasons indicated above, your committee's bill provided an exemption from the tax on local telephone service for private communications service if a separate charge is made for this service. It is understood that private lines and PBX systems generally will *immediately* qualify for this exemption. However, it is understood that Centrex systems--where the switching equipment is generally on the premises of the local exchange rather than on that of a subscriber--generally do not, *as yet*, provide for a charge which is separate and distinct from that for local telephone service. *Until* such a separation is made, this exemption, therefore, will not apply in the case of Centrex service. (Emphasis added.)

Deny knowledge or information, refer to statute

15. Section 4291 of the Internal Revenue Code requires that the operating telephone companies collect the excise tax on communication services. Plaintiffs and members of the class do not file excise tax returns. They rely upon defendants to calculate and to collect the proper amount of tax due.

Deny

16. Defendants have had the capability of making, or causing to be made, the separation of charges required for exemption under § 4252(d) at all times since 1961, but they either willfully or fraudulently or negligently failed to do so until recently, well knowing that the effect of such inaction, after

January 1, 1966, was to require plaintiffs and members of the class to pay greater amounts of excise taxes than they would have been obliged to pay had defendants made, or caused to have been made, the requisite separation of charges on January 1, 1966.

Deny

17. The continuing failure of defendants to make, or cause to be made, the required separation of charges constituted a violation of the mandate from Congress that such separation be made within a reasonable time.

Deny, refer to statute*

18. Amounts collected as excise taxes by the operating telephone companies, constitute, under § 7501 of the Internal Revenue Code, a special fund held in trust for the United States. Certain fiduciary duties are therefore owing from defendants to the United States with respect to excise taxes collected by the operating telephone companies from plaintiffs and class members.

Deny, refer to statute*

19. The customer, as the user of the communication services is the party liable, under § 4251(a) of the federal excise tax. Customers entrust the money for that tax to the operating telephone companies for the purposes of filing returns and paying the money over to the federal government, and fiduciary duties arise which the defendants owe to their customers. These duties relate not only to the handling of the money, but also to the calculation of the amount due.

Deny*

Withdrawn
[ ]

20. Interests of the defendants were, however, in conflict with their fiduciary duties owed to plaintiffs and class members. [Among these interests were the defendants' concern for competition from the interconnect industry and for their own dealings with the federal government. Had defendants made or caused to have been made the separation of charges earlier, users of P.B.X. systems and members of the interconnect industry would thereby have learned the breakdown between the costs of equipment

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* Paragraphs 18-23 of the complaint are directed to plaintiffs' breach of duty claim as set forth in Appendix A, Section II of the Pre-Trial Order and are not intended to state a claim arising under state law.

services and line services associated with the CENTREX system, which information would have aided members of the interconnect industry to compete more effectively against defendants, as hereinafter more fully appears.]

Deny*

21. In choosing not to make the requisite separation of charges, defendants heeded their own interests and violated their fiduciary duties owed to plaintiffs and class members.

Deny in part, admit [illegible] part, refer to statute*

22. Defendants were and are common carriers and public utilities. As such they owe certain statutory and/or common law duties to their customers, among which are: the duty to provide, or cause to be provided, reasonable and adequate service; the duty to provide, or cause to be provided, such service at reasonable, proper and not arbitrarily discriminatory rates; the duty to treat alike, or cause to be treated alike, all customers similarly situated; the duty to provide, or cause to be provided, service at the most favorable rate to which customers are entitled; and the duty to make, or cause to be made, no contract by which their power or ability to provide their service would be impaired.

Deny*

23. In failing to make, or cause to be made, the required separation of charges defendants violated their statutory and/or common law duties as public utilities and common carriers to plaintiffs and members of the class.

Deny, except as rephrased

24. The operating telephone companies have each entered into an agreement or contract or course of conduct with AT&T whereby, in return for specified compensation, AT&T has agreed to perform certain managerial and policy-making functions for each of the operating telephone companies. AT&T has thereby assumed the obligation to perform certain duties owed by the operating telephone companies to their customers.

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* Paragraphs 18-23 of the complaint are directed to plaintiffs' breach of duty claim as set forth in Appendix A, Section II of the Pre-Trial Order and are not intended to state a claim arising under state law.

Deny, except as rephrased

25. When the decision was made to provide the separation of charges to the members of the class, AT&T directed to the operating telephone companies the method to be used. The decisions when and how to make the separation were made or recommended by AT&T.

Deny

26. The duties referred to by [plaintiffs] in this complaint are among those duties assumed by AT&T by virtue of its course of conduct, its agreements with the operating telephone companies, and its being their parent corporation.

Deny

27. In failing to direct the operating telephone companies to make the required separation of charges, AT&T violated its assumed duties owed to plaintiffs and other members of the class.

Deny

28. AT&T has been an aider and abetor and a joint wrongdoer with the operating telephone companies in violating the duties owed to plaintiffs and other members of the class as set forth in this complaint.

Deny

29. AT&T materially influenced the operating telephone companies to engage in the actions, or lack of action, violating the duties owed to plaintiffs and other members of the class as set forth in this complaint.

Deny, except as rephrased

30. As a direct and proximate result of the wrongful actions by AT&T as set forth in this complaint, the operating telephone companies failed to make the separation of charges as set forth in this complaint. Thus, from January 1, 1966 until recently plaintiffs and members of the class were damaged in that they were required to pay and did pay higher excise taxes than they would have been required to pay had the requisite separation of charges been made on January 1, 1966. The records of defendants will establish the total amount of such damages, and plaintiffs estimate and therefore allege that such damages to the class total approximately fifty million dollars, and the damages to each

named plaintiff far exceed ten thousand dollars, exclusive of interest. But for the failure of the operating telephone companies to make the requisite separation of charges, the intra-office communications of plaintiffs and members of the class would have qualified as uses of private communication services and the charges therefor would have been exempt from tax. However, plaintiffs and all other members of the class they represent were, until recently, charged by and did pay to the operating telephone companies federal excise taxes on both their intra-office and their extra-office communications.

Count II

(Claim by All Plaintiffs Against AT&T)

Dismissed 31. Plaintiffs reallege and incorporate herein paragraphs 8 through 15 of Count I.

Dismissed 32. Section 6415 of the Internal Revenue Code allows the operating telephone companies to file a claim for refund of overcollected excise taxes where they have repaid the taxes to their customers or where they have obtained from their customers the consent to file on behalf of their customers.

Dismissed 33. Although the tax exemption for private communication services was effective January 1, 1966, the operating telephone companies have only recently begun to make a separation of charges on bills to customers and to collect from them excise taxes only on those charges allocable to extra-office communications. Any delay in tolling those statutes of limitation applicable to claims for refund of overcollected excise taxes which may be running against plaintiffs and members of the class is therefore of great prejudice to plaintiffs and to members of the class.

Dismissed

34. Recently, in providing, or causing to be provided, the separation of charges to their customers, defendants used, or caused the use of, cost data and accounting records available to them since the institution of CENTREX service. The separation of charges requisite to the tax exemption for intra-office communications therefore either actually existed on the books of the defendants or was at all times readily computable from information on the books of the defendants. Plaintiffs and members of the class were at all material times unaware that the separation of charges either actually existed on the books of the defendants or was readily computable from information on the books of defendants.

Dismissed

35. In Revenue Ruling 69-152, 1969-1 C.B. 289, the Internal Revenue Service held that where an operating telephone company maintained a separation of charges on its books but did not reflect such separation in its bills to its customers, those customers were nonetheless entitled to an exemption from the federal excise tax for those charges for private communication service.

Dismissed

36. Since the separation of the charges existed on the books of the defendants, the intra-office communications of plaintiffs and all other members of the class qualified as users of private communication services, effective January 1, 1966. However, until recently, plaintiffs and all other members of the class were charged, or caused to have been charged, federal excise taxes by defendants on both their intra-office and their extra-office communications.

Dismissed

37. Thus, from January 1, 1966 until recently defendants collected, or caused to have been collected, a greater amount in excise taxes from plaintiff and class members than they were entitled to collect, or cause to be collected, under the law, and plaintiffs and members of the class were required to pay and did

pay to the operating telephone companies excise taxes which were not in fact due.

Dismissed

38. Plaintiffs reallege and incorporate herein paragraph 30 of Count I.

Count III

(Claim By Home, Monsanto, Reynolds And Schenley Against AT&T And NYT)

Repeat ¶¶ 8-29

39. Home, Monsanto, Reynolds and Schenley reallege and incorporate herein paragraphs 8 through 29 of Count I.

Deny, except as rephrased

40. As a direct and proximate result of the wrongful actions, or lack of action, by defendants, as set forth in this complaint, NYT failed to make the separation of charges as set forth in this complaint. Thus, from January 1, 1966 until recently Home, Monsanto, Reynolds and Schenley and members of the class were damaged in that they were required to pay and did pay higher excise taxes than they would have been required to had the requisite separation of charges been made on January 1, 1966. The records of defendants will establish the total amount of such damages, and Home, Monsanto, Reynolds and Schenley estimate and therefore allege that such damages to the class total approximately thirty million dollars, and the damages to each of Home, Monsanto, Reynolds and Schenley far exceed ten thousand dollars, exclusive of interest. But for the failure of NYT to make the requisite separation of charges, the intra-office communications of Home, Monsanto, Reynolds and Schenley and members of the class would have qualified as uses of private communication services and the charges therefor would have been exempt from tax. However, Home, Monsanto, Reynolds and Schenley and all other members of the class they represent were, until recently, charged by and did pay to NYT federal excise taxes on both their intra-office and their extra-office communications.

Count IV

(Claim by Home, Monsanto, Reynolds, and Schenley
Against AT&T and NYT)

Dismissed

41. Home, Monsanto, Reynolds and Schenley reallege and incorporate herein paragraphs 8 through 15 of Count I.

Dismissed

42. Home, Monsanto, Reynolds and Schenley reallege and incorporate herein paragraphs 32 through 37 of Count II.

Dismissed

43. Home, Monsanto, Reynolds and Schenley reallege and incorporate herein paragraph 40 of Count III.

Count V

(Claim By All Plaintiffs Against All Defendants)

Repeat
¶¶ 8-29

44. Plaintiffs reallege and incorporate herein paragraphs 8 through 29 of Count I.

Deny, except as rephrased

45. As a direct and proximate result of the wrongful actions, or lack of action, by defendants, as set forth in this complaint, the operating telephone companies failed to make the separation of charges as set forth in this complaint. Thus, from January 1, 1966 until recently plaintiffs and members of the class were damaged in that they were required to pay and did pay higher excise taxes than they would have been required to had the requisite separation of charges been made on January 1, 1966. The records of defendants will establish the total amount of such damages, and plaintiffs estimate and therefore allege that such damages to the class total approximately fifty million dollars, and the damages to each of the named plaintiffs far exceed ten thousand dollars, exclusive of costs. But for the failure of the operating telephone companies to make the requisite separation of charges, the intra-office communications of plaintiffs and members of the class would have qualified as uses of private communication

services and the charges therefor would have been exempt from tax. However, plaintiffs and all other members of the class they represent were, until recently charged by and did pay to the operating telephone companies federal excise taxes on both their intra-office and their extra-office communications.

Count VI

(Claim by All Plaintiffs Against All Defendants)

Dismissed 46. Plaintiffs reallege and incorporate herein paragraphs 8 through 15 of Count I.

Dismissed 47. Plaintiffs reallege and incorporate herein paragraphs 32 through 37 of Count II.

Dismissed 48. Plaintiffs reallege and incorporate herein paragraph 45 of Count V.

Count VII

(Claim By All Plaintiffs Against All Defendants)

Repeat ¶¶ 8-29 49. Plaintiffs reallege and incorporate herein paragraphs 8 through 29 of Count I.

Withdrawn 50. Defendants and companies associated with them face no competition in the provision of CENTREX systems.

Withdrawn 51. Defendants and companies associated with them face substantial competition from the interconnect industry in the provision of P.B.X. systems.

Withdrawn 52. A customer who chooses to buy or rent a P.B.X. system from a member of the interconnect industry must nonetheless obtain the lines to be used for extra-office communication from the local operating telephone company.

Withdrawn 53. It was therefore in the interests of the defendants, with regard to their P.B.X. systems, to maintain high rates for line services and low rates for equipment services.

Withdrawn 54. For the defendants to provide the plaintiffs and other members of the class with the separation of charges to which they were entitled would have revealed what should have been the proper allocation between charges for line and equipment services for P.B.X. systems as well, and would therefore have had adverse effects on the defendants' competitive interests with regard to the interconnect industry.

Withdrawn 55. The decision to withhold the separation of charges and thereby to deny to the plaintiffs and to all other members of the class the tax exemption on their intra-office communications was part of an effort to thwart competition from the interconnect industry. That decision was the result of a combination, conspiracy or concert of action in New York City and elsewhere among the defendants and of a policy directed to and imposed upon the operating telephone companies by AT&T from New York City and elsewhere.

Withdrawn 56. The failure of the operating telephone companies to provide the separation of charges was a result of a combination, conspiracy or concert of action among some or all of the defendants and of a policy directed to the operating telephone companies by AT&T and constituted a violation of 15 U.S.C. § 2, commonly known as § 2 of the Sherman Act, in that it was part of a plan and attempt to monopolize or a conspiracy to monopolize the production and trade in P.B.X. systems.

Deny 57. The failure of the operating telephone companies to provide the separation of charges was a result of a combination, conspiracy or concert of action among some or all of the defendants and of a policy directed to the operating telephone companies by AT&T and constituted a violation of 15 U.S.C. § 1, commonly known as § 1 of the Sherman Act, in that it was a combination, conspiracy or concert of action in restraint of trade.

Withdrawn

58. The plaintiffs and all members of the class they represent were damaged in that among the anticompetitive effects of the actions of the defendants was a reduction in effective competition from the interconnect industry. The plaintiffs and all other members of the class they represent would have been able to obtain their CENTREX systems, or other P.B.X. systems, on more competitive terms had the separation of charges been made public and had the users of such systems and the members of the interconnect industry thereby learned of the breakdown on CENTREX systems between the costs of intra-office communications and the costs of extra-office communications. Plaintiffs estimate and therefore allege that such damages to the class total approximately fifty million dollars.

Deny, except as rephrased

59. As a further direct and proximate result of the wrongful actions or failure of action by defendants, as set forth in this complaint, the operating telephone companies failed to make the separation of charges as set forth in this complaint. Thus, from January 1, 1966 until recently plaintiffs and members of the class were damaged in that they were required to and did pay higher excise taxes than they would have been required to had the requisite separation of charges been made on January 1, 1966. The records of defendants will establish the total amount of such damages, and plaintiffs estimate and therefore allege that such damages to the class total approximately fifty million dollars, and the damages to each of the named plaintiffs far exceed ten thousand dollars, exclusive of costs.

But for the failure of the operating telephone companies to make the requisite separation of charges, the intra-office communications of plaintiffs and members of the class would have qualified as uses of private communication services and the charges therefor would have been exempt from tax. However, plaintiffs and all other members of the class they represent were, until recently, harged by and did pay to the operating telephone companies federal excise taxes on both their intra-office and their extra-office communications.

Count VIII

(Claim By All Plaintiffs Against All Defendants)

Repeat ¶¶ 8-15 60. Plaintiffs reallege and incorporate herein paragraphs 8 through 15 of Count I.

Repeat ¶¶ 32-37 61. Plaintiffs reallege and incorporate herein paragraphs 32 through 37 of Count II.

Repeat ¶¶ 50-59 62. Plaintiffs reallege and incorporate herein paragraphs 50 through 59 of Count VII.

DEMAND FOR JUDGMENT

WHEREFORE, Plaintiffs pray:

On Count[s] I [and II]

Deny; Dismissed [ ] A. That judgment be entered against AT&T in an amount equal to the difference between the amount of excise taxes paid by plaintiffs and the members of the class and the amount of excise taxes they should have been required to pay, plus interest from the date of each payment of excise taxes on the amount of damages relating to such payment; which payment cannot be precisel ascertained at this time but is believed to be approximately fifty million dollars.

On Count[s] III [and IV]

Deny;
Dismissed
[ ]

B. That judgment be entered against AT&T and NYT in an amount equal to the difference between the amount of excise taxes paid by plaintiffs and the members of the class and the amount of excise taxes they should have been required to pay, plus interest from the date of each payment of excise taxes on the amount of damages relating to such payments; which amount cannot be precisely ascertained at this time but is believed to be approximately thirty million dollars.

On Count[s] V [and VI]

Deny;
Dismissed
[ ]

C. That judgment be entered against all defendants in an amount equal to the difference between the amount of excise taxes paid by plaintiffs and the members of the class and the amount of excise taxes they should have been required to pay, plus interest from the date of each payment of excise taxes on the amount of damages relating to such payments; which amount cannot be precisely ascertained at this time but is believed to be approximately fifty million dollars.

On Counts VII and VIII

Deny

D. That judgment be entered against all defendants in an amount, as actual damages, equal to the difference between the amount of excise taxes paid by plaintiffs and the members of the class and the amount of excise taxes they should have been required to pay, plus interest from the date of each payment of excise taxes on the amount of damages relating to such payment; which amount cannot be precisely ascertained at this time but is believed to be approximately fifty million dollars.

Withdrawn E. That judgment be entered against all defendants in an amount, as actual damages, equal to the difference between the costs to the plaintiffs and members of the class of their CENTREX systems and the amount of costs they would have borne for such systems had defendant not violated § 1 and/or § 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, which amount cannot be precisely ascertained at this time but is believed to be approximately fifty million dollars.

Deny F. That judgment be entered against all defendants for three-fold the amount of actual damages sustained by plaintiffs and members of the class.

On Counts II, IV, VI, and VIII

Dismissed G. That the defendants be ordered to notify immediately all present and past users of CENTREX of their rights either to file their own claim for refund or to consent that a claim for refund be filed on their behalf by defendants.

Dismissed H. That the defendants be ordered to file immediately a claim for refund on behalf of any CENTREX user who consents that defendants so file, and, further, to pursue such claim or claims diligently.

On All Counts

Deny I. That each of the Counts of this Complaint is a proper class action.

Deny J. That judgment be entered for the plaintiff and all members of the class against the defendants for the costs of this action, including a reasonable attorneys' fee.

Deny K. That the plaintiff and all other members of the class have such other and further relief as this Court may deem just and proper.

Respecfully submitted,

HOGAN & HARTSON

By____________________________
Sherwin J. Markman

By____________________________
Jay E. Ricks

By____________________________
R. Clark Wadlow

Attorneys for Plaintiffs

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DORNBUSH, MENSCH, MANDELSTAM
& SCHWARTZ

By____________________________
Allen G. Schwartz

Local counsel

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New York, New York 10016

JUDGMENT ENTERED AUGUST 5, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
AUG 4 1977
S. D. OF N. Y.

- x

DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

-against-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

-against-

STATES OF AMERICA,

Third-Party Defendant.

- x

73 Civ. 2447 (EW)

JUDGMENT

AUG 5 1977

The third-party-defendant United States of America having moved this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment dismissing the Third-Party Complaint of defendants and third-party plaintiffs against third-party defendant United States of America, and defendants having moved this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment dismissing Counts II, IV, and VI of the Complaint herein, and said motions having come on to be heard before the Honorable Edward Weinfeld, United States District Judge, and the Court thereafter on March 23, 1977, having handed down its opinion and order granting the motions and dismissing Counts II, IV, and VI of the Complaint herein and dismissing the Third-Party Complaint of defendants and third-party plaintiffs against third-party defendant United States of America; and

The issues in the above-entitled class action having been brought on regularly for trial before the Honorable Edward Weinfeld, United States District Judge, on May 5, 6, 9, 10, 11 and 12, 1977, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on July 19, 1977, having handed down its opinion, findings of fact, and conclusions of law dismissing the Complaint in its entirety on the merits, it is

ORDERED, ADJUDGED AND DECREED that third-party defendant United States of America have judgment against defendants and third-party plaintiffs dismissing the Third-Party Complaint, with costs to be taxed against defendants and third-party plaintiffs, and it is further

ORDERED, ADJUDGED AND DECREED that defendants and third-party plaintiffs have judgment against plaintiffs and the plaintiff class, such class consisting of all persons who were taxable Centrex customers of one or more of the defendant operating companies at any time during the period between January 1, 1966 and the effective date in 1971 or 1972 of tariffs establishing separate Centrex station charges for exchange access and for intercommunication (such persons having been given notice of the above-entitled class action by certified mail, return receipt requested, pursuant to this Court's order entered on December 10, 1975) and who did not request exclusion from the plaintiff class, dismissing the Complaint in the above-entitled class action in its entirety on the merits, with costs to be taxed against plaintiffs.

Dated: New York, New York
August , 1977

ENTERED
[illegible] Clerk

Judgment Entered August 5, 1977

At a Slated Term of the United States District Court for the Southern District of New York, held in the United States Court House in the Borough of Manhattan, City of New York on the 5th day of MAY in the year of our Lord, One Thousand Nine Hundred and SEVENTY SEVEN

PRESENT:
HONORABLE: EDWARD WEINFELD
United States District Judge.

DUPONT GLORE FORGAN, INC.; et.al.

-vs-

AMERICAN TELEPHONE & TELEGRAPH, et.al.

Docket No. 73 Cv 2447

Now comes the Plaintiff By NICKERSON, KRAMER, LOWENSTEIN, NESSEN, KAMIN, SOLL: 919 THIRD AVE, NY. 10022; BY: EUGENE NICKERSON, 688-1100

and moves the trial of this cause. Likewise comes the Defendant by DAVIS, POLK, WARDWELL 1 CHASE MANHATTAN PLAZA, NY. 10005, HA-2-3400, BY: GUY STROUVE

Thereupon the cause proceeds to Trial. THURSDAY:

MAY 5, 1977 TRIAL BEGUN & CONTINUED
MAY 6 1977 TRIAL CONTINUED
MAY 9 1977 Trial Continued
MAY 10 1977 Trial Continued - PLTF RESTS. DEFTS MOTION FOR A DIRECTED VERDICT - DECISION RESERVED
MAY 11 1977 TRIAL CONT.
MAY 12 1977 TRIAL CONT. & CONCLUDED - DECISION RESERVED

(AN EXTRACT OF THE MINUTES)

DEPUTY CLERK---JOHN GRAGNANO

Judgment Entered August 5, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

-against-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Third-Party Defendant.

- x

73 Civ. 2447
(EW)

NOTICE OF
SETTLEMENT

SIRS:

PLEASE TAKE NOTICE that the within Judgment will be presented for settlement and signature to this Court, the Honorable Edward Weinfeld, U.S.D.J., at the United States Court House, Foley Square, New York, New York 10007, on the 2nd day of August, 1977, at 10:00 o'clock in the forenoon.

Dated: New York, New York
July 29, 1977

DAVIS POLK & WARDWELL

By____________________
A Member of the Firm

1 Chase Manhattan Plaza
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HA 2-3400

Attorneys for Defendants
and Third-Party Plaintiffs

Judgment Entered August 5, 1977

TO:

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Attorney for Third-Party
Defendant

OPINION DATED JULY 19, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

DUPONT GLORE FORGAN INCORPORATED, :
et al., :

Plaintiffs, :

-against- :

AMERICAN TELEPHONE AND TELEGRAPH :
COMPANY, et al., :

Defendants and Third- :
Party Plaintiffs, :

-against- :

UNITED STATES OF AMERICA, :

Third-Party Defendant.

- x

73 Civil 2447

OPINION,
FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

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Of Counsel

Opinion dated July 19, 1977

EDWARD WEINFELD, D. J.

In this class action, plaintiffs seek to recover from the American Telephone and Telegraph Company ("AT&T") and twenty-three companies affiliated with it (the "operating companies") a portion of the federal communications excise taxes which defendants collected from plaintiffs and paid over to the United States Government. Plaintiffs claim that those taxes were collected by reason of a contract, combination or conspiracy among the defendants in restraint of interstate commerce, in violation of Section 1 of the Sherman Act,(1) and seek treble damages. Alternatively, plaintiffs contend that the defendants violated an alleged statutory duty under the Excise Tax Reduction Act of 1965(2) ("the Act"), and seek recovery of taxes paid as a proximate result of the defendants' alleged breach of duty.(3)

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(1) 15 U.S.C. § 1. The statute reads in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

(2) P.L. 89-44, § 302, 79 Stat. 136.

(3) Plaintiffs originally asserted two other theories of liability. One claim, that the defendants attempted or conspired to monopolize the production and trade in PBX systems, *see* pp. 8-11 *infra*, in violation of § 2 of the

The case arises out of a provision of the Act which exempted from the excise tax generally imposed on local telephone service, "private communication service," such as intercommunication between different telephones in the subscriber's office, if a separate charge is made for such intercommunication. (4) The plaintiffs are users of Centrex systems, a form of business telephone service which permits both intercommunication and calls to and from the outside telephone network. The gist of their complaint is that the defendants failed to establish a separate charge for the intercommunication portion of Centrex between 1965 and 1971 or 1972, and that, as a result, the plaintiffs paid a greater amount of excise tax than they would

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footnote 3 cont'd

Sherman Act, 15 U.S.C. § 2, was withdrawn. A further claim that the entries on defendants' books and records were sufficient to constitute separate charges for exchange access and intercommunication, see pp. 17-18 infra, and that plaintiffs were therefore not required to pay the entire amount of the tax which was collected from them, was dismissed by the Court before trial, along with a third-party complaint filed by the defendants against the government. DuPont Glore Forgan Inc. v. American Tel. & Tel. Co., 428 F. Supp. 1297 (S.D.N.Y. 1977). Familiarity is assumed with that opinion and with the Court's prior opinion certifying the plaintiff class. DuPont Glore Forgan Inc. v. American Tel. & Tel. Co., 69 F.R.D. 481 (S.D.N.Y. 1975).

(4) Internal Revenue Code of 1954, as amended, (hereinafter I.R.C.) §§ 4251(a), 4252(a), (d). See pp. 16-18 infra.

have paid had such a separation of charges been made.(5)

I. FACTUAL BACKGROUND

a. The Parties

The plaintiff class consists of all persons who were taxable(6) Centrex subscribers of one or more of the defendant operating companies at any time between January 1, 1966, the effective date of the Act, and the effective date in 1971 or 1972 of the operating companies' tariffs establishing a separate Centrex charge for intercommunication, and who did not request exclusion from the class. This includes over a thousand subscribers with over 1,400 Centrex locations.

Collectively the defendants, along with certain other subsidiaries of AT&T,(7) are sometimes referred to as the Bell System. The relationship among the various companies of the Bell System was described by one witness as a "federal system." Each of the operating companies is an independently organized, autonomous corporation managed by its own board of directors, providing local telephone service,(8) including Centrex service, in one or more states. Each operating company also connects with the facilities of other telephone companies, including non-Bell System companies and the Long Lines Department of AT&T, to provide long-distance calls to and from its service area. The local telephone service, including Centrex service, of each of the operating companies is subject to regulation under state laws intended to protect the public against excessive or unduly discriminatory rates.(9) Within its service area each operating company is the only company authorized under these laws to render Centrex service. These laws further require that the types of telephone service and the rates charged by each operating company be set forth in tariffs filed with the public utility commission in each state.(10) In general, no changes can be made in rates or service until an amendment to the tariff is filed with, and allowed to become effective by, the public utility commission.(11) Thus each of the operating companies, within its service areas, is a regulated monopolist.

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(5) Jurisdiction is based upon § 4 of the Clayton Act, 15 U.S.C. § 15, and upon 28 U.S.C. §§ 1331 and 1337.

(6) Certain governmental, educational and charitable organizations are not subject to the telephone excise tax. _See_ I.R.C. § 4253, as amended by the Tax Reform Act of 1976, P.L. 94-455, § 1904(a)(6), 90 Stat. 1520. During the period relevant to this lawsuit similar exemptions had been contained in I.R.C. §§ 4292-94.

(7) Western Electric Company, Inc., which manufactures and sells communications equipment, and Bell Telephone Laboratories, Inc. Until October 1966 AT&T owned 99.85% of the capital stock of Western Electric; since that time AT&T has owned 100% of its stock. The capital stock of Bell Laboratories is owned 50% by AT&T and 50% by Western Electric.

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(8) AT&T itself provides no local telephone service, but, through its Long Lines Department, furnishes interstate telephone service between points served by different operating companies.

(9) This opinion will refer to the statutes regulating intrastate telephone service in six states - California, Florida, Illinois, Massachusetts, New York and Ohio - as examples; the statutes in other states are generally similar. Interstate telephone service is regulated by the Federal Communications Commission pursuant to Title II of the Federal Communications Act, 47 U.S.C. § 201 et seq.

Although the operating companies are independently organized, they are closely affiliated with each other and with AT&T. AT&T owns all of the capital stock of sixteen of the operating companies, at least 70% of the capital stock of five, and a substantial minority interest in the other two.(12) An AT&T officer sits on the board of directors of each of the operating companies except one, and transfers of personnel between the operating companies and AT&T are common. The president of each of the operating companies is chosen with the concurrence of the chairman of the board of AT&T.

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(10) E.g., Cal. Pub. Util. Code §§ 489, 532 (West 1975); Fla. Stat. Ann. §§ 364.04, 364.08 (West 1968); Ill. Rev. Stat. ch. 111 2/3, §§ 35, 37 (1973); Mass. Ann. Laws ch. 159, § 19 (Michie/Law. Co-op 1970); N.Y. Pub. Serv. L. §§ 91, 92 (McKinney 1955 & Supp. 1976); Ohio Rev. Code Ann. §§ 4905.30, 4905.32 (Page 1977).

(11) See, e.g., Cal. Pub. Util. Code § 454 (West 1975); Fla. Stat. Ann. § 364.05 (West 1968); Ill. Rev. Stat. ch. 111 2/3, § 36 (1973); Mass. Ann. Laws, ch. 159, §§ 19, 20 (Michie/Law. Co-op 1970 & Supp. 1977); N.Y. Pub. Serv. L. § 92(2) (McKinney Supp. 1976); Ohio Rev. Code Ann. §§ 4909.17, 4909.18 (Page 1977).

(12) AT&T owns 26% of the capital stock of Cincinnati Bell, Inc., and 18% of the capital stock of Southern New England Telephone Company.

The operating companies are also affiliated with AT&T by virtue of license agreements. Under these agreements each operating company uses AT&T's patented telephone equipment within its service area. The license agreements obligate AT&T to engage in research and development and to provide technical advice and assistance to the operating companies in a wide range of matters. This assistance is rendered, for example, by responses to specific inquiries from the operating companies, by conferences involving personnel from all the operating companies and AT&T, and by memoranda and newsletters prepared by persons at AT&T and distributed throughout the Bell System. Through system-wide task forces and committees the operating companies often participate in preparing materials on which AT&T's recommendations are based. As a result, AT&T's advice is usually followed by the operating companies, with variations to account for local situations. Of particular relevance to this case is the fact that most of the operating companies generally relied on AT&T for information and advice relating to the federal excise tax.

b. Characteristics of Telephone Service

The nature of this case requires a fairly detailed description of some of the technical aspects of telephone service. Ordinary telephone service consists of the privilege of making calls within a local exchange area and, upon payment of an additional amount (message units or a toll charge), outside that area, plus the privilege of receiving telephone calls from any telephone within or outside the local exchange area. A subscriber receives access to the telephone network through a "line" or "loop" (usually consisting of a pair of wires) which is run from the telephone company central office to the subscriber's premises. At the subscriber's end, the line terminates in a "station," a broad term to describe the telephone instrument or other equipment used by the subscriber. When the subscriber makes a telephone call, switching equipment at the telephone company central office (or, in the case of long distance calls, at several telephone company offices) connects his line to the line of the called telephone, thereby completing the call. This ability to place calls through the telephone network is known as "exchange access."

A business or other organization which has a large number of personnel at one location generally will have more than one exchange access line and more than one station. Such a subscriber often finds that there are many calls between its own stations and desires a specific service for such intercommunication. Equipment for intercommunication can be leased or purchased from a non-Bell System company or provided by an operating telephone company. However, prior to 1968, the defendants' tariffs provided that non-Bell System equipment could not be connected with the telephone network.(13) Thus, a subscriber who obtained his intercommunication equipment from a competitor of one of the defendants required two telephone systems -- one for exchange access and one for intercommunication.

(i) PBX Service

For many years prior to the introduction of Centrex service in 1961, the operating companies provided the capability of intercommunication among a subscriber's stations and exchange access through Private Branch Exchange ("PBX") service. The switching equipment for PBX service is generally located on the subscriber's premises. Each of the subscriber's stations is connected to this PBX switching equipment by a station line, and the switching equipment is connected in turn to the telephone company central office by a number of "trunks," or pairs of wires (physically similar to the lines used for ordinary telephone service) which provide exchange access. However, since not all of a PBX subscriber's stations are likely to be making outside calls at once, a PBX subscriber generally has many fewer trunks than stations. In addition, one or more attendant positions such as switchboards or consoles are connected to the PBX switching equipment. A PBX subscriber generally pays a separate monthly charge for the service provided by each PBX station, each PBX trunk, each attendant position and the PBX switching equipment, as well as charges for any supplemental services furnished.

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(13) See Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420, 421, 427 (1968).

An incoming call to a PBX system arrives over one of the trunks connecting the PBX switching equipment to the telephone company central office, and rings at the attendant's position. After answering the phone and ascertaining which individual or extension the caller wishes, the attendant completes the call by establishing a connection between the trunk line on which the call is coming in and the desired station line. If a person wants to make an outgoing call from one of the PBX stations, his station line is connected through the PBX switching equipment -- either manually by the attendant (as with incoming calls) or automatically -- to one of the trunks connecting the PBX switching equipment to the telephone company central office. The call is then dialed and routed through the central office as with ordinary telephone service. If a person wants to call from one PBX station to another within the subscriber's system, the station lines are connected through the PBX switching equipment, either automatically or manually by the attendant.

In 1961, message unit and toll calls could not ordinarily be identified to the individual PBX station which made the call; rather, they were billed to the subscriber's PBX system as a whole. However, at that time six of the defendant operating companies furnished PBX with identified outward dialing ("IOD"), which permits identification of the individual station making the outward toll call for the customer's administrative purposes. The only type of IOD available with PBX service in 1961 was Centralized Automatic Message Accounting ("CAMA"), in which outgoing calls are interrupted by an operator at a telephone company office, who asks the caller for the number he is calling from and records it for use in billing. However, certain more advanced types of switching equipment which did not become available for use with PBX until 1965 or thereafter are capable of identifying the calling station automatically, by a process known as automatic number identification ("ANI"). Both CAMA and ANI provided essentially the same service, that is, IOD.

Another service feature provided by some of the operating companies with their PBX service prior to 1961 was direct inward dialing ("DID"). DID enables persons outside the subscriber's PBX system to dial any PBX station within the system directly, bypassing the attendant station. Prior to 1961 twelve operating companies offered PBX with DID, including the same six who offered PBX with IOD.

(ii) Centrex Service

In 1961 the operating companies began to offer Centrex service, which is the subject of this litigation. Centrex service, like PBX service, provides the capability of intercommunication among the telephone stations within the subscriber's Centrex system, as well as exchange access.(14)

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(14) Not all Centrex stations could make or receive calls from the outside telephone network. Centrex stations that could only make or receive calls to or from other Centrex stations in the same Centrex system are called restricted Centrex stations. Unless otherwise indicated, all references in this opinion to "Centrex stations" refer to unrestricted Centrex stations.

While the precise nature of Centrex service varied among the operating companies, in broad outline it was similar throughout the Bell System. Centrex service can be provided using two different physical arrangements, known as Centrex-CU (for "Customer") and Centrex-CO (for "Company" or "Central Office"), depending on the location of the switching equipment. These two types of Centrex service are functionally similar. Each permits intercommunication and exchange access. In addition, each allows incoming calls to be dialed directly to an individual Centrex station (DID) and permits identification of the particular station making a message unit or toll call (IOD).

However, there are several differences between the equipment used in Centrex-CU and that used in Centrex-CO. Centrex-CU uses essentially the same equipment as PBX service with DID and IOD. Thus, the switching equipment is located on the customer's premises, and is connected to the central office by trunks. In Centrex-CO, on the other hand, all the switching equipment is located at the telephone company central office, and each Centrex station is connected to the central office by an individual line. Calls between Centrex stations, as well as outside calls, are routed through the central office. Second, ANI was initially available only with Centrex-CO, which used more advanced switching equipment; until ANI became available with the PBX switching equipment used in Centrex-CU after 1965, Centrex-CU could provide IOD only through an operator, by means of the CAMA system described above. However, despite these differences between Centrex-CU and Centrex-CO, the overall service provided by each was essentially similar.

Like the technical aspects of Centrex service, the Centrex rate structure varied somewhat from jurisdiction to jurisdiction, but there were broad areas of similarity among all the operating companies. Whereas PBX rates are based upon a separate monthly charge for the service provided by each individual piece of equipment, the operating companies' Centrex tariffs established a "package" rate, including the cost of all the facilities and equipment required. Thus during the period relevant to this litigation, from 1961 to 1971 or 1972, a Centrex subscriber paid a single monthly charge for each Centrex station and attendant position, which covered both exchange access and intercommunication, rather than separate monthly charges for the various pieces of equipment used. Moreover, although the costs of providing Centrex-CO and

Centrex-CU differ because of the different equipment used, Centrex service had a single composite rate regardless of serving method, based on an average of the costs of Centrex-CO and Centrex-CU. The only difference was that the rates for Centrex-CO were slightly higher to reflect the floor space and power provided by the telephone company for the switching equipment which was located on its premises, rather than on the subscriber's as in the case of Centrex-CU. Finally, a Centrex subscriber did not generally have a choice of whether he would receive Centrex-CO or Centrex-CU because Centrex service was a single offering. The tariffs of most of the operating companies reserved to the company the right to determine which type of equipment would be used in each case. Even when the tariff did not explicitly so provide, the company generally made the decision itself based upon considerations of which type of service could be provided more economically.

c. The Federal Communications Excise Tax

From 1917 to 1924 (15) and from 1932 to date, (16) telephone and other communications services have been subject to a federal excise tax. This tax is imposed upon the person paying for the telephone service, but the company providing the service is required to collect the tax from its subscribers and remit it to the government. (17) In 1961, when the operating companies began to offer Centrex service, a tax of 10% was imposed on the amounts paid for "general telephone service." Essentially "general telephone service" included any kind of local telephone service, which permitted exchange access, i.e., which permitted the subscriber to complete a call through a local exchange. (18) The statute specifically prescribed that PBX service was "general telephone service." (19) In addition, since Centrex service permitted local exchange access, it too was taxable as "general telephone service." However, since the defendants' tariffs at that time prohibited intercommunication equipment furnished by a non-Bell System company from being connected to the telephone network,(20) such equipment was not capable of providing exchange access and was not taxed, since it did not fall within the definition of "general telephone service." This created a competitive disadvantage for the defendants' PBX and Centrex services, since they were taxed while their competition was not.

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(15) War Revenue Act of 1917, ch. 63, § 500(e), 40 Stat. 300; Revenue Act of 1918, ch. 18, § 500(f), 40 Stat. 1057 (1919); Revenue Act of 1921, ch. 136, § 500, 42 Stat. 227.

(16) Revenue Act of 1932, ch. 209, § 701, 47 Stat. 169; Internal Revenue Code of 1939, § 3465; I.R.C. § 4251.

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(17) I.R.C. §§ 4251(a)(1), 4291, 7501; see generally DuPont Glore Forgan Inc. v. American Tel. & Tel. Co., 428 F. Supp. 1297 (S.D.N.Y. 1977).

(18) Excise Tax Technical Charges Act of 1958, P.L. 85-859, § 133(a), 72 Stat. 1275. General telephone service did not include telephone services for which a toll charge was paid, such as long distance calls, but such "toll telephone service" was taxed separately at the same rate of 10%. Id.

(19) Id.

The Act substantially restructured the provisions of the communications excise tax, in part "to make it clear that it is the service as such which is being taxed and not merely the equipment being supplied."(21) To ameliorate the defendants' competitive disadvantage, the Act exempted from the tax, as of January 1, 1966, "private communication service," defined in relevant part as:

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(20) See p. 8 supra.

(21) H.R. Rep. No. 433, 89th Cong., 1st Sess. 30 (1965), reprinted in [1965] U.S. Code Cong. & Ad. News 1645, 1676; S. Rep. No. 324, 89th Cong., 1st Sess. 35 (1965), reprinted in [1965] U.S. Code Cong. & Ad. News 1690, 1725. These reports will hereinafter be referred to as "H.Rep." and "S.Rep.," respectively, and cited only to pages in U.S. Code Cong. & Ad. News.

The Act eliminated the definition of "general telephone service," and made "local telephone service" taxable. "Local telephone service" was defined as

> (1) the access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone or radio telephone stations constituting a part of such local telephone system, and (2) any facility or service provided in connection with a service described in paragraph (1).
>
> I.R.C. § 4252(a).

"private communication service," as defined hereinafter, and toll telephone service, which included long distance calls and Wide Area Telephone Service (WATS), were excluded from "local telephone service" but were taxed at the same rate. I.R.C. § 4251.

> communication service furnished to a subscriber which entitles the subscriber . . . to the use of an intercommunication system for the subscriber's stations, *regardless of whether such . . . intercommunication system may be connected through switching with [a local telephone exchange*.] (22)

The Congressional committee reports noted that this provision was added to remove the defendants' "severe competitive handicap" in furnishing intercommunication systems. (23)

However, the Act further provided that intercommunication service was not tax-exempt "unless a separate charge is made for such service." (24) Because the defendants' PBX rates were based upon a charge for each individual piece of equipment used, a "separate charge" could be identified for those portions of a PBX system devoted to intercommunication, such as the PBX switching equipment, and those devoted to exchange access, such as the trunks. Amounts paid by a PBX subscriber for the former items were therefore exempt from the tax. However, since Centrex was billed on a "package rate" basis, covering the entire cost of service in one charge, there was no separate charge for intercommunication distinct from that for exchange access, and thus the entire amount paid by a subscriber for Centrex service was taxable even after passage of the Act.(25) This was recognized in the Congressional committee reports:

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(22) I.R.C. § 4252(d) (emphasis supplied).

(23) H. Rep. at 1677; S. Rep. at 1726.

(24) I.R.C. § 4252(d).

> It is understood that . . . PBX systems generally will immediately qualify for this exemption. However, it is understood that Centrex systems -- where the switching equipment is generally on the premises of the local exchange rather than on that of the subscriber -- generally do not, as yet, provide for a charge which is separate and distinct from that for local telephone service. Until such a separation is made, this exemption, therefore, will not apply in the case of Centrex service.(26)

In passing the Act, Congress contemplated a gradual reduction and eventual elimination of the telephone excise tax. Thus the tax was to be reduced from 10% to 3% on January 1,

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(25) Restricted Centrex stations, which did not provide exchange access, see n. 14 supra, were thus not taxable under the Act.

(26) H. Rep. at 1677; S. Rep. at 1726. As described supra pp. 12-13, the Centrex switching equipment is located on the telephone company's premises only in the case of Centrex-CO. However, neither Centrex-CU nor Centrex-CO had a separate charge for intercommunication.

1966, with subsequent annual reductions of 1% until it was eliminated entirely. However, shortly after the reduction to 3% took effect it was rescinded. Between 1966 and 1970 the reduction and elimination of the tax was postponed several times because of the government's need for revenue during the Vietnam War.(27) Finally, in 1970, Congress provided that the excise tax would remain at 10% through 1972, and then over a ten-year period would be reduced 1% each year until its ultimate elimination on January 1, 1982.(28) Until 1971 the tariffs of all the operating companies continued to contain a package rate for Centrex service. Thus during that period the members of the plaintiff class were taxed on the entire amount they paid for Centrex service at the rate of 10%, while PBX customers and persons who obtained intercommunication systems from non-Bell System companies were taxed only on the amounts they paid for exchange access, and not on the amounts they paid for intercommunication. It was not until 1971 or 1972 that the various operating companies filed revised tariffs establishing separate charges for exchange access and for intercommunication.

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(27) See n. 62 infra.

(28) Excise, Estate, and Gift Tax Adjustment Act of 1970, P.L. 91-614, § 201(b), 84 Stat. 1836. Pursuant to this law the excise tax is now 5%.

Against this extensive factual background the Court considers the plaintiffs' claims.

II. SHERMAN ACT CLAIM

a. Legal Standard

Plaintiffs contend that defendants' failure to effect a separation of charges for exchange access and intercommunication until 1971 or 1972 was the result of a conspiracy or combination in violation of Section 1 of the Sherman Act. To sustain this claim, plaintiffs must prove by a fair preponderance of the evidence two essential elements: first, that the defendants entered into a "contract, combination . . . or conspiracy," and second, that such contract, combination or conspiracy was "in restraint of trade or commerce among the several States."(29) As to the first element, plaintiffs must prove that the defendants engaged in some form of concerted action, since independent, unilateral action does not violate Section 1 of the Sherman Act.(30) Plaintiffs must show that the defendants "had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement."(31) However, a finding of actual explicit agreement is not necessary. "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of commerce," suffices;(32) so, too, a "silent combination or understanding" may be sufficient.(33) Moreover,

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(29) 15 U.S.C. § 1. *See* House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 870 (2d Cir. 1962); American Tel. & Tel. Co. v. Delta Communications, Inc., 408 F. Supp. 1075, 1088 (S.D. Miss. 1976); Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 531 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); Beckman v. Walter Kidde & Co., 316 F. Supp. 1321, 1324 (E.D.N.Y. 1970), *aff'd*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972); Carbon Steel Prods. Corp. v. Alan Wood Steel Co., 289 F. Supp. 584, 587 (S.D. N.Y. 1968); *cf.* Sum of Squares, Inc. v. Market Research Corp. of America, 401 F. Supp. 53 (S.D.N.Y. 1975).

(30) FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1029 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1116 (1977); Hanson v.

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footnote 30 cont'd

Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 813 (1977); Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1042 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976); Modern Home Inst., Inc. v. Hartford Acc. & Indem. Co., 513 F.2d 102, 108-09 (2d Cir. 1975); Overseas Motors, Inc. v. Import Motors, Ltd., 375 F. Supp. 499, 531 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

(31) American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946); *accord*, Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976); *see* United States v. Standard Oil Co., 316 F.2d 884, 890 (7th Cir. 1963) ("consciousness of commitment to a common scheme").

(32) Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939); *accord*, United States v. Masonite Corp., 316 U.S. 265, 275 (1942); *see also* Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 704 (1969); American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

(33) United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967).

it is hornbook law that conspiracies are rarely proved by direct evidence; an inference of conspiracy can be drawn from the acts and conduct of the alleged conspirators. (34) Consciously parallel behavior among defendants may be considered as circumstantial evidence that they acted in concert; however, by itself, without more, it is insufficient to sustain an inference of concert of action. (35) Since consciously parallel behavior may logically result, without any agreement, from the fact that the same behavior is in the independent competitive interest of each defendant, to support an inference of conspiracy there must also be some independent facts, such as that the action taken was interdependent and against the apparent individual economic interest of each defendant absent an agreement.(36)

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(34) Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 704 (1969); United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960); Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41 (1954); American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612 (1914); Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d Cir.), cert. denied, 429 U.S. 885 (1976); Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1345 (3d Cir. 1975).

(35) Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41 (1954); Modern Home Inst., Inc. v. Hartford Acc. & Indem. Co., 513 F.2d 102, 110 (2d Cir. 1975); Kreager v. General Elec. Co., 497 F.2d 468, 471 (2d Cir.), cert. denied, 419 U.S. 861 (1974); Bogosian v. Gulf Oil Corp., 393 F. Supp. 1046, 1048-52 (E.D. Pa. 1975).

Second, the plaintiffs must establish that the defendants' contract, combination or conspiracy constituted a forbidden restraint of trade. Because of the potentially vast scope of a prohibition of all agreements which restrain trade in any manner, a so-called "rule of reason" has been adopted which proscribes only unreasonable restraints of trade.(37) Some activities, however, are so perniciously anticompetitive that they are conclusively presumed to be unreasonable and are declared illegal per se. These include price fixing among competitors,(38) division of markets,(39) resale price maintenance,(40) and group boycotts.(41) Combinations which do not fall within one of the per se classifications must be carefully scrutinized to see if they are reasonable in the light of all the surrounding facts and circumstances.(42)

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(36) Modern Home Inst., Inc. v. Hartford Acc. & Indem. Co., 513 F.2d 102, 110-11 (2d Cir. 1975); Bendix Corp. v. Balax, Inc., 471 F.2d 149, 160 (7th Cir. 1972), cert. denied, 414 U.S. 819 (1973); Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc., 408 F. Supp. 1251, 1278 (S.D.N.Y. 1976); American Tel. & Tel. Co. v. Delta Communications Corp., 408 F. Supp. 1075, 1088 (S.D. Miss. 1976); Independent Iron Works, Inc. v. United States Steel Corp., 177 F. Supp. 743, 746-47 (N.D. Cal. 1959), aff'd, 322 F.2d 656 (9th Cir.), cert. denied, 375 U.S. 922 (1963); see First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 287-88 (1968).

(37) Continental T.V., Inc. v. GTE Sylvania Inc., 45 U.S.L.W. 4828, 4831 (U.S. June 23, 1977); United States v. Topco Assocs., Inc., 405 U.S. 596, 606-07 (1972); Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958); Apex Hosiery Co. v. Leader, 310 U.S. 469, 490-501 (1940); Standard Oil Co. v. United States, 221 U.S. 1, 60, 62 (1911).

(38) United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

(39) United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

b. Contentions of the Parties

Plaintiffs' antitrust claim centers about allegations that the defendants entered into two different but closely related agreements in which the defendants were under the direction and domination of AT&T. First, plaintiffs charge that in 1961 or thereafter the defendants entered into an express or implied agreement to maintain a uniform rate structure for Centrex service, including (a) a package charge for each Centrex station without a separate charge for the use of each item of basic equipment; (b) a single Centrex offering treated essentially the same for rate purposes regardless of the type of switching equipment used to provide the service and regardless of the location of the switching equipment; and (c) the reservation to the operating company, rather than to the customer, of the choice of Centrex-CU or Centrex-CO. Plaintiffs contend that this agreement is evidenced by "instructions" about Centrex service and rates sent by AT&T to each of the operating companies in 1961, by meetings, attended by representatives of the operating companies, and correspondence in which AT&T urged the operating companies to follow its "instructions," and by the fact that the Centrex tariffs filed by the operating companies followed the AT&T instructions in all important respects, differing only in "irrelevant and minor" details.

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(40) Albrecht v. Herald Co., 390 U.S. 145 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

(41) Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).

(42) See Continental T.V., Inc. v. GTE Sylvania Inc., 45 U.S.L.W. 4828, 4831 (U.S. June 23, 1977); United States v. Topco Assocs., Inc., 405 U.S. 596, 607 (1972); White Motor Co. v. United States, 372 U.S. 253, 261-63 (1963); United States v. Columbia Steel Corp., 334 U.S. 495, 527-28 (1948); Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

According to the plaintiffs, this agreement was motivated by the Bell System's desire to increase its profits. By 1961 the companies of the Bell System collectively had an investment of more than $600,000,000 in PBX switching equipment. Plaintiffs assert that this investment was threatened by the development of more advanced switching equipment. Thus, plaintiffs claim that one purpose of making Centrex a single offering and reserving to the operating company the right to choose which customers would receive Centrex-CO (which used the new equipment) and Centrex-CU (which used the old), was to protect the value of this investment by allowing each operating company to use the older equipment whenever it was profitable to do so. A second alleged motive for the conspiracy was that the defendants were dissatisfied with their earnings on PBX service and sought, by using old PBX equipment under the name of Centrex and charging for it at higher rates, to improve their earnings on that equipment without having to apply for a rate increase.(43) The package rate and single Centrex offering allegedly furthered this goal by focusing attention on the service rather than on the equipment and thus concealing the increased earnings from subscribers and regulatory authorities.

The second aspect of plaintiffs' antitrust claim is an alleged agreement among the defendants, at or about the time of the passage of the Act in 1965, to continue to maintain the package rate for Centrex service and not to separate Centrex rates into charges for exchange access and intercommunication. Plaintiffs contend that the evidence shows that AT&T decided that "defendants' interests would not be advanced by a separation of Centrex charges," because if new Centrex tariffs were filed, customers and regulatory commissions might attack Centrex rates as excessive and discriminatory. Defendants allegedly feared that their tariffs would be found excessive because their earnings on Centrex service were substantially higher than on PBX service. The claim of discrimination is based on a contention that, although Centrex-CO allegedly cost the operating companies more to provide than Centrex-CU, and Centrex-CO was allegedly more desirable to the subscriber than Centrex-CU, the costs of the two services were averaged and the subscriber paid a single rate with no choice between the two services. Thus the charge is that Centrex-CU subscribers in effect subsidized Centrex-CO subscribers and received a less desirable service for the same price.

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(43) In general, a new service such as Centrex in 1961 is initiated merely by the filing of tariffs, but when a rate increase on existing service is sought, hearings and more extensive regulatory review are common.

Plaintiffs contend that to implement this decision AT&T instructed the operating companies in 1964 and thereafter that separate charges should not be established. They further contend that, despite the fact that it would have been in the independent economic interest of each operating company to establish separate charges since that would have facilitated the marketing of Centrex by lessening the excise tax for its customers, the operating companies followed AT&T's instructions and no company established separate charges until 1971. Separate charges were not established, according to plaintiffs, until AT&T decided that the threat of competition from non-Bell System suppliers of intercommunications systems had increased so that the competitors' tax advantage had to be removed; each operating company then separated its charges by a method plaintiffs contend was approved by AT&T.

Plaintiffs contend that the alleged agreements "deprived customers of the benefit of independent pricing decisions" by the operating companies and therefore constituted a price fixing conspiracy which is per se illegal under Section 1 of the Sherman Act. Even if the conspiracy is not held to be per se illegal, plaintiffs claim that it should nonetheless be found in violation of the so-called "rule of reason." Plaintiffs argue that the defendants' alleged agreement had the effect of increasing the price paid by Centrex subscribers by the amount of the excise tax on the intercommunication portion of Centrex.

The defendants deny plaintiffs' charges entirely. They deny that any agreement, express or implied, was reached among them with respect to the filing of Centrex rates, the failure to establish separate charges after 1965, or the ultimate filing of revised tariffs in 1971. They claim that AT&T did no more than make recommendations and give advice and assistance with respect to Centrex rates, and that each operating company was an independent entity free to accept or reject AT&T's recommendations, and which made its own decisions with respect to its own Centrex rates. They admit that in making these decisions the operating companies considered the advice and recommendations of AT&T given pursuant to the license contract, but deny that this normal working relationship had a sinister purpose. They contend that the Centrex tariffs of the operating companies in fact differed in many respects from each other and from AT&T's recommendations. Moreover, they contend that even if there was an agreement among them it did not restrain trade, and that each operating company had valid independent business reasons for adopting the Centrex rate structure described above and for not establishing separate charges for exchange access and intercommunication until after 1971.

The defendants also make two claims of antitrust immunity which must be dealt with preliminarily. First, the defendants claim that, since each of the operating companies is a subsidiary, wholly or partly owned, of AT&T, they cannot be liable for an antitrust violation because "agreements as to prices between affiliated corporations do not violate Section 1 of the Sherman Act." As a broad principle of law this must be rejected. The Supreme Court has said in no uncertain terms that "common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws."(44) The issue of whether, in a given case, affiliated corporations have conspired in violation of the Sherman Act is composed of two separate but related inquiries corresponding to the two elements of a Sherman Act claim. The first is whether the defendants are legally separate entities capable of conspiring or whether they constitute, in effect, a single business unit.(45) In this case it is clear that the defendants are organized and operated independently of one another, and do not in any way constitute a single business unit. Indeed defendants press this very point in opposing plaintiffs' claim that an agreement was reached. Thus there is no doubt that the defendants in this case are legally capable of conspiring.(46) The second issue, assuming that a contract, combination or conspiracy is found, is whether the particular combination constitutes a restraint of trade. In some cases an agreement among affiliated corporations is held not to restrain trade because, for example, it merely effects an internal redistribution of corporate profits or because there was no competition between the defendants to be restrained.(47) However, corporate affiliation

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(44) Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951). See United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 116-17 (1975); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947); Brager & Co. v. Leumi Securities Corp., 429 F. Supp. 1341, 1345 (S.D.N.Y. 1977).

(45) See Knutson v. Daily Review, Inc., 548 F.2d 795, 801-02 (9th Cir. 1976), cert. denied, 45 U.S.L.W. 3840 (U.S. June 27, 1977); George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc., 508 F.2d 547, 557 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975); Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39, 44 (5th Cir. 1974), cert. denied, 419 U.S. 1110 (1975); Sulmeyer v. Seven-Up Co., 411 F. Supp. 635, 639 (S.D.N.Y.

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footnote 45 cont'd

1976); I. Haas Trucking Corp. v. New York Fruit Auction Corp., 364 F. Supp. 868, 873 (S.D.N.Y. 1973); cf. Beckman v. Walter Kidde & Co., 316 F. Supp. 1321, 1325-26 (E.D.N.Y. 1970), aff'd, 451 F.2d 593 (2d Cir. 1971), cert. denied, 408 U.S. 922 (1972).

(46) Cf. TV Signal Co. of Aberdeen v. American Tel. & Tel. Co., 462 F.2d 1256, 1260 (8th Cir. 1972); Chastain v. American Tel. & Tel. Co., 401 F. Supp. 151, 159-60 (D.D.C. 1975). But cf. Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356, 1358 n.1 (2d Cir. 1976). In particular, it should be noted that AT&T owns less than 50% of the stock of two of the operating companies, see p. 5 supra, which might suffice to establish their independence by itself.

(47) See Syracuse Broadcasting Corp. v. Newhouse, 319 F.2d 683, 687-88 (2d Cir. 1963); Call Carl, Inc. v. BP Oil Corp., 403

is only one facet of the broad question of restraint of trade.(48) Thus, by itself, corporate affiliation confers no immunity upon these defendants.

Similarly, defendants claim that "agreements as to prices between noncompeting sellers" do not violate the Sherman Act and that, since the defendants each serve an exclusive territory and do not compete with each other in furnishing telephone service, they cannot be liable under the Sherman Act even if they conspired to fix their Centrex rates. Plaintiffs dispute the factual premise for this argument, claiming that they have shown that the defendants are in fact competitors because their "pricing decisions, if made independently, would have had some impact on each other."(49) Even

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footnote 47 cont'd

F. Supp. 568, 572-73 (D. Md. 1975); Report of the Attorney General's National Committee to Study the Antitrust Laws 34-35 (1955); *cf*. United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 113-14 (1975).

(48) *See* Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39, 44 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); TV Signal Co. v. American Tel. & Tel. Co., 462 F.2d 1256, 1260 (8th Cir. 1972); Brager & Co. v. Leumi Securities Corp., 429 F. Supp. 1341, 1345 (S.D.N.Y. 1977); *cf*. cases cited n. 42 *supra*.

(49) *See* pp. 74-75 *infra*.

assuming that the operating companies do not compete, however, defendants' position is not well taken. An agreement among noncompetitors can constitute an unreasonable restraint of trade in appropriate circumstances.(50) The extent of competition, if any, among the defendants, like their corporate affiliation, is but one factor in determining whether the alleged agreement is in restraint of trade.

c. The History of Centrex Rates

The events surrounding the introduction of Centrex service in 1961, the passage of the Act in 1965 and the defendants' actions thereafter, and the ultimate filing of revised Centrex tariffs in 1971 and 1972, present factual issues that concern in large part the reasons why certain corporate actions were taken. The plaintiffs view the defendants as a monolithic entity, often referring to "AT&T's decision" or "AT&T's reasons." This disregards the nature of the relationship between AT&T and its affiliates, and obscures the essential fact that the relevant decisions within AT&T and the operating companies were made by individuals. The purpose of corporate actions must be determined in the light of what each individual acting within the scope of his authority on behalf of the corporation knew and considered in exercising his judgment upon which such corporate action was taken, not by what other persons in other departments or other corporations who were without authority or responsibility for those decisions might have known.(51)

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(50) See, e.g., Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968); Albrecht v. Herald Co., 390 U.S. 145, 150 n.6 (1968); Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 511-12 (3d Cir. 1976). The cases cited by defendants, see n. 90 infra, hold merely that, on the facts of those cases, an agreement among noncompetitors should not be held per se illegal as price fixing.

In late 1960 a Bell System-wide Task Committee was formed, consisting of rate-making executives from several of the operating companies chosen for their expertise in relevant areas, and representatives of various divisions of AT&T, including Operating, Engineering and Marketing. After several months of work this committee developed "basic principles and procedures which it would seem feasible for all Companies to follow in establishing rate treatment for Centrex Service." Materials embodying these principles, including a letter signed by an Assistant Vice President of AT&T and comprehensive technical binders, were sent to each of the operating companies by AT&T on April 28, 1961; the principles were further discussed at a meeting of rate-making personnel from each operating company and from AT&T on May 17 and 18, 1961.(52)

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(51) Cf. Woodmont, Inc. v. Daniels, 274 F.2d 132, 137 (10th Cir. 1959), cert. denied, 362 U.S. 968 (1960).

These recommendations summarized the basic features of Centrex service in the following language:

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(52) At trial the plaintiffs offered into evidence three documents which appear to be notes taken of the meetings of May 17 and 18, 1961, and similar documents relating to the meetings of October 1965, *see* p. 41 *infra*. The defendants objected that these documents were inadmissible hearsay. However, the parties stipulated in the pretrial order that each such document was "prepared or caused to be prepared" by an employee of one of the operating companies who attended the meetings, and that each was "directed to or concerned with matters within the scope of employment" of the person who prepared the document. Thus, as to the operating company which employed the person preparing it, each document is admissible within the terms of Rule 801(d)(2)(D), Fed. R. Evid. *Cf*. United States v. Miller, 246 F.2d 486, 490 (2d Cir.), *cert*. *denied*, 355 U.S. 905 (1957); United States v. S.B. Penick & Co., 136 F.2d 413, 416 (2d Cir. 1943). Moreover, at the close of the plaintiffs' case the Court ruled that the independent non-hearsay evidence adduced by plaintiffs was sufficient, under United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert*. *denied*, 397 U.S. 1028 (1970), to allow consideration of the hearsay evidence as to all alleged conspirators.

However, the fact that these documents are admissible does not mean that they are entitled to any substantial weight. As the Court stated at the time the exhibits were received, it is apparent upon their face that the documents embody "a man's impressions, what he recorded at the time, expressing his own opinion or what he believed he heard." In many cases the notes are fragmentary and unclear in meaning. Moreover some of the persons who prepared the documents are unidentified.

- Equivalent of conventional PBX service
  PLUS
- Direct in-dialing to stations
- Station identification on outward toll traffic
- Transfer of incoming calls from one station to another
- Intercept - machine or attendant
- Night connections(53)

The principal rate objectives of the recommendations were to promote high development of Centrex service, so that it would ultimately become the standard for business subscribers;(54) to yield an adequate rate of return on the equipment used, and in particular to improve company earnings on PBX facilities, since PBX rates had not, according to the recommendations, kept pace with costs; to be competitive with non-Bell System telephone systems; to "[f]oster Systemwide uniformity of rate approach within all practicable limits"; and to relate Centrex rates to the rates for existing services to which it was similar, including individual business lines and PBX service. It was expected that Centrex rates would be somewhat higher than PBX rates but somewhat lower than individual business line rates.

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(53) "Direct in-dialing" and "[s]tation identification" are, respectively, DID and IOD. "Intercept" refers to a service in which calls dialed to unassigned numbers may be routed to an attendant or to a recorded announcement. "Night connections" allow calls coming in to the attendant position to be answered even after the attendant has left. "Transfer" is self-explanatory.

(54) The defendants wanted Centrex to become a standard offering because it promised to offer significant savings over PBX service. Operator time would be reduced because the capability for DID and IOD meant that there would be more calls dialed directly, more station-to-station calls, and fewer "time and charges" calls. Moreover, each call was likely to require less circuit time since it could be dialed directly to the extension rather than through a switchboard.

The proposed Centrex rate structure was designed to promote these ends. Although Centrex could be provided with two different types of equipment, and despite the acknowledged differences in cost and facilities between these two types of service,(55) it was recommended that Centrex be treated as a single offering, giving the operating company as much flexibility as possible in choosing whether to offer Centrex-CU or Centrex-CO to a particular subscriber. In this way the company could choose whichever service would be most economical in the case of a given customer. For example, a subscriber who had PBX equipment on his premises already, or who was located so far from the telephone company's central office that the costs of the individual lines used for each Centrex-CO station would be very great, would be likely to receive Centrex-CU. This approach would maximize revenues and enable the operating companies to offer somewhat lower Centrex rates than if each customer had the choice of whichever type of Centrex service he preferred. Moreover the "single offering" concept prevented premature retirement and replacement of PBX equipment, with a potential for increased rates, by utilizing that equipment (as Centrex-CU) whenever it was economically feasible to do so. In addition to the recommendation that Centrex be provided as a single offering, it was recommended that Centrex rates be the same whether Centrex-CU or Centrex-CO was offered,(56) to remove any economic incentive a subscriber might have to choose one service or the other and because Centrex-CU and Centrex-CO provided basically similar service.

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(55) *See* pp. 12-14 *supra*.

It was also recommended that Centrex be provided with a package rate, including all costs of service in a single charge per Centrex station, primarily to make Centrex a simple and readily understandable service. The PBX rate structure, based upon the individual pieces of equipment used by each subscriber, was somewhat difficult for subscribers to comprehend since many of them were not familiar with the technical aspects of telephone service. A single monthly charge based on the number of stations and attendant positions -- items clearly visible to the subscriber and directly related to his communications needs -- was much easier to apply and explain to subscribers than the more complex PBX rates. Moreover, in order to quote a rate for PBX service to a potential PBX subscriber, a detailed engineering study had to be made to estimate what equipment would be necessary to provide him adequate service; if the customer thereafter decided the cost was too high, the engineering study was wasted. Furthermore, in the case of Centrex-CO there was no feasible alternative to a package rate since the individual trunks and items of switching equipment used in PBX service did not exist as identifiable items dedicated to a single subscriber. A package rate for Centrex-CU as well was thus desirable to minimize the differences between the two types of service and enhance the "single offering" concept.

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(56) Except for an additional charge, in the case of Centrex-CO, resulting from the fact that the switching equipment was located on telephone company premises. See p. 14 supra.

Finally, the Centrex rate materials sent to the operating companies emphasized that system-wide uniformity of rate treatment was highly desirable. The recommendations recognized that the conditions faced by each company, including such factors as the cost of service, the available equipment and customer needs, varied widely, and that each company would have to develop its own rates based on these local conditions. However, the recommendations set forth detailed suggestions for developing Centrex rates and an example of a Centrex rate schedule for illustrative purposes. It was suggested that the operating companies should try to follow the proposed rate treatment as closely as possible. The reason for this was that Centrex customers often had installations in more than one state, and it was felt that these companies would find it easier to understand Centrex and would be less likely to complain if the rate treatment were similar in each jurisdiction.

Tariffs generally embodying these recommendations were filed by most of the operating companies in the next several years. In late 1964, when AT&T was lobbying for a total or partial repeal of the communications excise tax -- the lobbying effort that preceded the passage of the communications excise tax portions of the Act -- AT&T employees, including Robert D. Weber, then in charge of Centrex rate matters at AT&T, began to consider the effect of the proposed changes on Centrex. In particular they considered whether the operating companies should establish separate charges for exchange access and intercommunication, so as to give Centrex subscribers the benefit of any tax reduction that might be enacted. Several methods of establishing separate charges were considered and found unsatisfactory; finally, for reasons noted hereafter, it was decided that separate charges should not be established. On December 29, 1964, Weber sent a letter to rate personnel at a number of operating companies, soliciting their views on one possible method of separation. The reaction was mixed: some companies had no strong objections and others thought that the change should not be undertaken. This reaction confirmed Weber's belief that a separation of charges should not be recommended. Weber communicated his belief to the operating company personnel who responded to his letter.

In October 1965, after passage of the Act, there were two meetings of personnel from the operating companies to explain to them the changes brought about by the Act. The tax treatment of Centrex was one item discussed at these meetings, although in light of the extensive changes made by the Act it was by no means the only subject. The operating company personnel were told that unrestricted Centrex stations would be taxable while restricted stations would not be.(57) Also at this meeting, representatives of several of the operating companies inquired about the possibility of establishing separate charges for exchange access and intercommunication. They were told that AT&T had no plans to recommend that such a separation be made. Over the next few years several operating companies inquired of AT&T about the possibility of establishing separate charges, sometimes in response to questions from Centrex subscribers.(58) AT&T continued to advise against such a step for reasons to be discussed. During this period, no operating company established separate charges for exchange access and intercommunication, and several companies that had not previously filed Centrex tariffs did so using the "package rate" and "single offering" concepts.

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(57) See n. 14 supra.

In 1971, because of a significant extension of the tax by Congress and changed competitive conditions, the matter was reassessed. A group at AT&T, including Robert M. Kemp, Weber's successor in charge of Centrex rate matters at AT&T,(59)

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(58) The record reveals that five subscribers - American Oil Co., Monsanto Co. (a named plaintiff herein), Union Carbide Corp., Mobil Oil Corp. and Owens-Corning Fiberglass Corp. - made inquiries to their respective operating companies between 1965 and 1970. In at least three cases the operating companies consulted with AT&T before answering that no separation would be made. In addition, the issue was discussed several times within AT&T.

(59) Kemp had also been involved with Centrex rate matters in 1961 and had helped prepare the April 1961 Centrex materials.

developed a method of establishing separate charges for exchange access and intercommunication. A letter recommending that separate charges be established and describing the proposed method was sent by AT&T to the operating companies on September 27, 1971. The letter suggested that the companies follow a common method of establishing separate charges. Such uniformity was desired to minimize the burdens of any Internal Revenue Service audit by attempting to ensure that one audit of the method would suffice for all companies. Within a year and a half each of the operating companies had filed revised tariffs establishing separate charges for exchange access and intercommunication. In the great majority of cases the subscriber's Centrex rates were unchanged as a result. (60) However, the companies did not all adopt the method suggested by AT&T. Those who did not follow it discussed their own proposals with personnel at AT&T to try to ensure that their method would survive Internal Revenue Service scrutiny.

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(60) The revised tariff filed by New York Telephone Co. in New York State decreased its Centrex station charges by a negligible amount, totalling an estimated $1,100 the first year. The Chesapeake and Potomac Telephone Co. of West Virginia sought a general rate increase simultaneously with its revised Centrex tariff. The revised tariffs filed by the other operating companies did not result in any change in their total Centrex station charges.

Of central importance to this case are the reasons why the Centrex rate structure was not modified until 1971, and, in light of plaintiffs' emphasis on AT&T's supposed domination of the operating companies, the reasons why first Weber and then Kemp, who it is contended were "at the heart and soul" of the conspiracy, did not recommend such a change. First, revising Centrex tariffs to reflect separate charges for exchange access and intercommunication was expected to be a difficult, expensive and time-consuming task, involving detailed engineering and cost studies, preparation of new tariffs, filing of those tariffs with regulatory commissions, extensive bookkeeping and administrative changes and retraining of personnel.(61)

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(61) Plaintiffs contend that the filing of new tariffs was not necessary in order to establish separate charges sufficient to meet the statutory requirement. In support of this claim they rely primarily upon the fact that language referring to tariffs was dropped from a draft of proposed excise tax legislation presented by AT&T lobbyists to the staff of the Joint Congressional Committee on Internal Revenue Taxation when the bill was submitted to the committee. However, this evidence is not relevant to the construction of the Act. The purpose of examining legislative history is to attempt to ascertain Congressional intent on ambiguous issues. See, e.g., Cantor v. Detroit Edison Co., 428 U.S. 579, 618 (1976) (Stewart, J., dissenting); United States v. Wise, 370 U.S. 405, 414 (1962); Marriott In-Flite Servs. v. Local 504, Air Transport Div., Transport Workers of America, Dkt. No. 76-7466 (2d Cir. May 24, 1977), slip op. at 3740-43; United States v. Thompson, 319 F.2d 665, 668 (2d Cir. 1963). Consideration of unofficial materials which were never, so far as the record shows, brought to the attention of a single Congressman cannot possibly shed light upon the intent of Congress. The meaning of "separate

In particular there were difficulties in developing an appropriate method for establishing separate charges for Centrex-CO,

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footnote 61 cont'd

charge" as used in the Act must be found in the Act itself and its legislative history.

There is nothing in these sources to indicate that a "separate charge" was intended to mean anything other than a tariff charge, which would be the ordinary construction of a statute dealing with regulated public utilities, whose charges are required by law to be embodied in their tariffs. See pp. 4-5 supra. Reference to the regulation of telephone companies was in fact made on the Senate floor during discussion of the Act. 111 Cong. Rec. 13624-25, 14073 (1965) (remarks of Sen. Long).

In any event, the history cited by plaintiffs does not support their position. First, the reference to tariffs in the AT&T draft was made in attempting to distinguish local exchange service from toll telephone service and not in defining "private communication service." Moreover there is no explanation of why the language referring to tariffs was dropped; plaintiffs' theory that the committee staff intended to allow a separation of charges to be made without filing tariffs is pure conjecture. Cf. Trailmobile Co. v. Whirls, 331 U.S. 40, 61 (1947); Gemsco, Inc. v. Walling, 324 U.S. 244, 260 (1945). In short, there is no indication that Congress intended to apply the "separate charge" provision to anything other than a tariff.

Plaintiffs also rely on Rev. Rul. 69-152, 1969-1 C.B. 289, which held that a sufficient "separate charge" existed when telephone company records identified separately the monthly charges for equipment and service even if the customer's bills did not. However, nothing in this ruling indicates whether or not the tariffs of the operating company in question had separate charges, nor does the ruling refer specifically to Centrex as opposed to PBX. In fact, in an unpublished technical advice memorandum communicated to defendants, the Internal Revenue Service adopted the position that the provisions of an operating company's tariff are controlling. In sum, Kemp, Weber, and other persons involved in considering the question of establishing separate charges, who received consistent advice from AT&T's tax attorneys that a tariff revision would be necessary, were fully justified in relying on that advice.

in which the same stations, lines, and switching equipment provided exchange access and intercommunication. Second, the package rate concept of Centrex was relatively new. Many operating companies' Centrex tariffs were only a year or two old and had apparently been well received by subscribers and regulatory commissions. It was felt that seeking to modify the "package rate" concept so soon after approval was undesirable and might meet resistance from regulatory commissions. Weber and Kemp also had doubts whether any method chosen to separate charges would be acceptable to the Internal Revenue Service; at least one method of establishing separate charges was rejected upon the advice of AT&T tax lawyers that the method would not pass IRS scrutiny.

In addition, Kemp and Weber were concerned about the possibility of an expensive, time-consuming challenge before a regulatory commission if new rates were filed. When a telephone company proposes to change existing tariffs, the subscribers to the service in question constitute a ready-made body of potential intervenors who might protest to the regulatory commission. While it is true that a change in tariffs which had only the effect of lowering the excise tax would be unlikely to attract much opposition, the fact remains that the rate-making personnel in the operating companies and AT&T recognized the possibility that either subscribers or commissions might take the opportunity to attack the Centrex rate structure in general. While these officials did not consider that any attack on Centrex rates would be justified or have merit, nevertheless the expense of litigating such a challenge could greatly increase the costs of making the change, and the ultimate outcome was uncertain.

Finally, Weber and Kemp believed during the years after passage of the Act that the communications excise tax would expire within a few years, especially since they were aware of AT&T's lobbying activities against the tax. Thus, they felt it was not worth going through a lengthy and expensive refiling of tariffs, which might itself have taken several years, for the sake of a tax savings that would shortly be achieved in any event. Plaintiffs respond that no knowledgeable person could have believed, in light of the government's need for revenue as a result of the Vietnam War, that the tax would be allowed to expire, and that AT&T's Washington lobbyists and tax attorneys were aware of this. But the fact remains that those persons who were responsible for the decisions relating to Centrex rates, and who testified credibly at the trial, did so believe. In fact this belief was not wholly unreasonable. While Congress on several occasions postponed the reduction and elimination of the excise tax, nonetheless at all times between 1965 and 1970 the tax was scheduled to expire within a few years and the Congressional reports indicated an intention that the tax be soon eliminated. (62)

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(62) The Tax Adjustment Act of 1966, P.L. 89-368,§ 202, 80 Stat. 38, which became effective only two and one-half months after the reduction of the excise tax effected by the Act, see pp. 18-19 supra, reinstated the 10% tax rate until April 1, 1968, at which time the tax was to be reduced to 1% as provided in the Act. The Congressional reports stated that the tax reduction was not "rescinded" but "merely postponed for 2 years . . . in view of current budgetary and economic conditions." H.R. Rep. No. 1285, 89th Cong., 2d Sess. 9 (1966), reprinted in [1966] U.S. Code Cong. & Ad. News 1933, 1941; S. Rep. No. 1010, 89th Cong., 2d Sess. 10 (1966), reprinted in [1966] U.S. Code Cong. & Ad. News 1985, 1993. In 1968, shortly before the tax was scheduled to be reduced pursuant to this act, it was temporarily extended at a 10% rate. P.L. 90-285, 82 Stat. 92 (1968). Later that year the 10% rate was extended for another year and a half, until January 1, 1970, and subsequent annual reductions to 5%, 3% and 1% were enacted, with total repeal planned for 1973. Revenue and Expenditure Control Act of 1968, P.L. 90-364, § 105(b), 82 Stat. 251. Similarly, the Tax Reform Act of 1969, which became effective two days before the scheduled reduction of the tax in 1970, postponed each annual reduction of the tax another year, with final elimination set for January 1, 1974. P.L. 91-172, § 702(b), 83 Stat. 487. Both in 1968 and 1969 Congress indicated that the extension of the tax was a temporary budgetary measure. H.R. Rep. No. 1104, 90th Cong., 2d Sess. 8 (1968), reprinted in [1968] U.S. Code Cong. & Ad. News 2341, 2348; S. Rep. No. 1014, 90th Cong., 2d Sess. 12-13 (1968), reprinted in [1968] U.S. Code Cong. & Ad. News 2354, 2366; H.R. Rep. No. 91-413, 91st Cong., 1st Sess., Part 1, at 12 (1969), reprinted in [1969] U.S. Code Cong. & Ad. News 1645, 1656; S. Rep. No. 91-552, 91st Cong., 1st Sess. 15 (1969), reprinted in [1969] U.S. Code Cong. & Ad. News 2027, 2042.

Defendants perhaps had an unduly optimistic view of likely Congressional action reducing or eliminating the tax, but it was a view for which they can hardly be faulted in light of Congressional attitudes at that time.

By 1971 two changed factors, already noted, prompted the recommendation to establish separate charges. First, Congress in 1970 provided that the communications excise tax would remain in effect for ten more years.(63) This removed one of the major reasons why a separation of charges had not previously been recommended, namely the prospect of an imminent elimination of the tax. Second, in 1968 the Federal Communications Commission had struck down the provisions of the Bell System's tariffs that forbade non-Bell System equipment from interconnecting with the telephone network.(64) As a result more direct competition in business telephone service began to materialize in 1971. This indicated that a separation would be desirable because effecting a decrease in the tax would enable the defendants' Centrex service better to face competition both from non-Bell System equipment and from the defendants' own untaxed PBX systems.(65) The impact of Centrex' competitive disadvantage was increased by recent Internal Revenue Service rulings that had treated as taxable certain auxiliary services provided with Centrex which previously had been considered non-taxable.(66)

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(63) See p. 19 supra.

(64) Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420 (1968).

Plaintiffs deny that these were the factors motivating the defendants. As previously noted, they contend that the failure to establish separate charges for exchange access and intercommunication was the object of a conspiracy to prevent regulatory scrutiny of Centrex rates that might have revealed that they were excessive or discriminatory. However, plaintiffs' argument is based largely upon fragmentary excerpts from documents and testimony taken out of context. The totality of the evidence negates plaintiffs' contentions. At no time were officials of the operating companies concerned that upon the filing of revised tariffs, regulatory commissions would hold Centrex rates excessive or discriminatory. All the witnesses who testified at the trial -- Kemp, Weber, and two operating company rate-making officials -- testified that they neither had themselves, nor had expressed to them, such concern. It is true that one of the reasons revised Centrex tariffs were not filed was the possibility of regulatory proceedings. But the defendants were not, as plaintiffs contend, seeking to protect excessive rates of return; rather, they wanted to avoid the time, burden, and expense of such a proceeding, and its uncertain outcome. This was a natural and legitimate concern of defendants' officers and employees, if not their duty, and does not establish a conspiratorial purpose. As one witness put it, a rate proceeding was a "can of worms."

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(65) The prospect of competition also raised concern that, because Centrex-CO and Centrex-CU were made a single offering, a competitor might claim that one service unfairly subsidized the other, even if this were not the case. This consideration suggested that Centrex-CO and Centrex-CU should be separated from each other, but did not directly affect the decision whether or not to establish separate charges for exchange access and intercommunication.

(66) See Rev. Rul. 73-270, 1973-1 C.B. 444, a published version of rulings previously made privately to various Bell System companies.

Moreover, plaintiffs have not established that there was any basis for apprehension that rates were excessive. Centrex earnings were generally higher than PBX earnings, but the defendants felt that they had not been earning an adequate rate of return on PBX service. Any question about the level of Centrex rates was based as much on concern that the rates would be held too low in relation to individual business line rates as on concern that they would be found too high in relation to PBX rates. In fact in 1972 the Colorado Public Utilities Commission ordered the rates on Centrex-CO raised substantially, holding that Centrex-CO was essentially similar to individual business line service. (67) Although the United States Government, between 1961 and 1965, filed three challenges to Centrex rates, in each case the rates were sustained against claims that they were excessive. (68) Insofar as the record reveals, these were the only challenges to Centrex rates. Moreover, there is testimony that in at least one instance the rates were reviewed by the appropriate state agency prior to filing so that there was never any question that they were excessive. Thus there is no support for the contention that the defendants were motivated by a concern that Centrex rates would be found excessive.

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(67) Mountain States Tel. & Tel. Co., Dec. No. 81320 (Colo. P.U.C. 1972), aff'd, 186 Colo. 260, 527 P.2d 524 (1974). See also Mountain States Tel. & Tel. Co., Dec. No. 83232 (Colo. P.U.C. 1973).

(68) In 1962 the Department of Defense filed a protest to the Centrex tariffs filed by Southern Bell Telephone and Telegraph Co. in Tennessee; the Tennessee Public Service Commission dismissed the protest on April 17, 1963, which order was affirmed by the Tennessee Chancery Court in 1964. An appeal was dismissed by stipulation. Also in 1962 the Department of Defense filed a protest with respect to Southern Bell's Centrex tariffs in Louisiana, but the protest was never prosecuted. In 1963 the General Services Administration filed a Petition for Investigation with the New York Public Service Commission, with respect to New York Telephone Company's Centrex tariffs. The petition was ultimately dismissed by the Public Service Commission on November 9, 1965.

Nor have plaintiffs shown that Centrex rates discriminated between Centrex-CU and Centrex-CO subscribers. Plaintiffs make two claims in this respect. First, they contend that Centrex-CO cost the operating companies more than Centrex-CU and that subscribers who received Centrex-CU thus subsidized those who received Centrex-CO. The evidence on this point is ambiguous. While the AT&T recommendations of April 1961 indicated that, based on the costs assumed in the illustrative rate structure, Centrex-CO would cost more than Centrex-CU because of the cost of the lines running from the subscriber's premises to the central office, rate-making personnel at AT&T and the operating companies could not be sure of the actual costs of the two types of service, since the accounting procedures prescribed by the Federal Communications Commission for the operating companies prevented any precise estimate of those costs without a major survey.

Plaintiffs' second claim of discrimination is that Centrex-CO was more advantageous to the subscriber than Centrex-CU in several respects: first, because it provided IOD through ANI rather than through an operator using the

CAMA system; second, because the Centrex-CU switching equipment was located on the subscriber's premises and was bulky, noisy and heavy; and third, because the Centrex-CO switching equipment was more modern and capable. There is no evidence, however, that subscribers were concerned about the size, noise or weight of Centrex-CU switching equipment on their premises; indeed, AT&T has this equipment at its own main office in New York City. Nor is there evidence that customers preferred CAMA, which provided a service essentially identical to ANI. In any event, only a small percentage of telephone calls, five to ten percent, used IOD by any means. Finally, while the switching equipment may have differed, the basic service provided by Centrex-CO and Centrex-CU was functionally similar; there is no evidence subscribers were concerned about the technical capabilities of their switching equipment.

More important, the fact that there were some differences between Centrex-CU and Centrex-CO does not establish that there was rate discrimination. It is common in the telephone industry to provide what is essentially the same service through different types of equipment, and to charge a single rate for the service. Thus, while the Bell System has been introducing direct distance dialing, some customers have had

CAMA and some have had ANI in connection with their long distance calls, yet all have been charged the same rate. Similarly, the costs of serving residential or business customers may vary widely depending on the subscribers' distance from the central office and the physical aspects of the installation. Yet it is common to provide such service based upon the average cost of serving all subscribers. In other words, the fact that Centrex service was provided with two different types of equipment at a single rate was not cause for concern, since Centrex-CU and Centrex-CO were functionally equivalent.

In sum, based upon the totality of the evidence, including the trial testimony and the forthright demeanor of Kemp and Weber, the Court rejects plaintiffs' contention that the defendants' failure to file separate charges for exchange access and intercommunication after 1965 was motivated by a desire to shield Centrex rates from regulatory scrutiny.

d. The Charge of Conspiracy or Illegal Agreements

Plaintiffs' claim that there was an agreement among the defendants to maintain a uniform rate structure and not to establish separate charges is to be considered in light of the foregoing facts. According to plaintiffs this conspiracy was directed by AT&T, and the operating companies "marched together in close formation." Plaintiffs characterize the materials sent by AT&T to the operating companies in 1961 as "instructions" rather than recommendations. They point to the emphasis on the importance of uniformity among the operating companies, and to the fact that in filing Centrex tariffs each company adhered to what plaintiffs consider the "principal features" of Centrex service, namely the package rate, single offering, and reservation of choice of Centrex-CU or Centrex-CO to the operating company, as evidence that the operating companies agreed to follow the AT&T "instructions." Plaintiffs further argue that in 1964 AT&T made a decision not to establish separate charges for exchange access and intercommunication; that the various conferences and communications between AT&T and the operating companies left the latter with not "the slightest doubt as to AT&T's wishes or as to the course that the other defendant operating companies would follow"; and that in fact none of the companies deviated from AT&T's position. Plaintiffs claim that, absent an agreement among the defendants, one or more of the operating companies would have found it in its own interest to revise its

Centrex tariffs and to establish separate charges so as to save its customers the tax, and that the failure of any company to do so leads to an "overwhelming inference" that there was a conspiracy among the defendants.

However, the relationship among the defendants is of crucial significance in considering whether the evidence supports a finding of conspiracy.(69) The operating companies are all subsidiaries of or affiliated with AT&T, and AT&T is obligated under its license contracts to provide them technical advice and assistance. This arrangement affords each of the operating companies the benefit of the research and technical expertise available to the Bell System as a whole. In Weber's words, AT&T provides a "centralized staff resource" for the operating companies. Given this relationship it was only natural that rate-making personnel from the operating companies should seek and receive advice from their coordinates at AT&T on rate and tax matters, and that personnel at AT&T should seek information from their coordinates in the operating companies to assist them in developing recommendations. These contacts were frequent, but were in the nature of an exchange of information and advice, not of solicitation and acceptance of concerted action. Thus, the fact that the operating companies conferred with or were advised by their parent organization, or exchanged views with one another, does not necessarily establish that they engaged in illegal concerted or collaborative action.

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(69) *Cf.* United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 113-14 (1975).

Moreover, AT&T did not give any "instructions" to the operating companies. The materials sent to the operating companies in April 1961 were no more than recommendations developed pursuant to AT&T's obligations under the license contracts. The persons who prepared those recommendations felt that they constituted a desirable and reasonable method of establishing Centrex rates, and that uniformity among the operating companies would be desirable to facilitate customer comprehension. These opinions were communicated to the operating companies in the April 1961 material and the May 1961 meeting. But it was also stated that each operating company was free to devise its own Centrex rate structure based upon its own evaluation of its own needs. The recommendations were not mandatory upon the operating companies. No representative of any operating company, during the May 1961 meeting or at any other time, made any agreement, either with AT&T or with any other operating company, to follow any of AT&T's Centrex rate recommendations, or understood that any other operating company was committed to doing so. Rather, each operating company was an independent entity with its own rate-making personnel, which made its own decisions as to the type of tariffs it would file, taking into account AT&T's recommendations as well as other relevant factors.(70)

This independence of judgment is borne out by an examination of the operating companies' Centrex tariffs. One company, Michigan Bell, filed its Centrex tariffs even before receiving the AT&T recommendations.(71) Although most of the other operating companies filed Centrex tariffs within two years after receiving the AT&T recommendations, several did not initiate Centrex service for several years thereafter.(72) The operating companies' Centrex tariffs were not sent to AT&T for review or approval prior to filing, although persons at AT&T were generally aware of the status of the tariffs and were available to respond to specific inquiries and to give advice. While each of the Centrex tariffs did follow the broad outlines of the AT&T recommendations in some respects, including the package rate, single offering, and effective reservation of choice to the operating company, this is not surprising in light of the extensive work, including input from the operating companies, that went into developing the recommendations so that they would be generally appropriate. Moreover, the operating companies' tariffs departed in many other respects from the AT&T recommendations. Three companies did not offer Centrex-CO in one or more jurisdictions. In many jurisdictions not all of the service features recommended by AT&T as part of the basic Centrex offering were included.(73)

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(70) In this respect this case differs from United States v. Masonite Corp., 316 U.S. 265 (1942) and Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). In each of those cases competitors entered into separate agreements with a third party. The Supreme Court found the evidence sufficient to establish that, despite the fact that each defendant made its agreement independently, each was aware that common action was being taken, and a conspiracy was thus found. In this case, the evidence does not establish that there was any agreement between any of the operating companies and AT&T.

(71) However, Michigan Bell was represented on the Task Committee, and thus rate-making personnel at Michigan Bell were generally aware of the committee's approach even before the April 1961 recommendations were received.

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(72) Centrex tariffs were not filed by nine companies in eleven states in the two years following AT&T's initial recommendations. Centrex tariffs were not filed by six companies in six states until 1965 or later.

(73) Three companies in three states did not offer the intercept service; four companies in eight states did not offer night connections. Each of these was part of the basic Centrex

The minimum number of stations required per subscriber, the initial contract period, and the actual rates all varied widely among the companies.(74) While plaintiffs claim that these variations were "minor," they nonetheless indicate that each operating company individually exercised independent judgment in developing its Centrex rates.

Plaintiffs have also failed to support their claim that there was any agreement among the defendants not to establish separate charges for exchange access and intercommunication following passage of the Act. No commitment not to establish separate charges was ever sought by AT&T or given by any operating company. The Bell System meetings in October 1965 were informational meetings of "implementers," not policy-making conferences. AT&T informed the operating companies at those meetings of its interpretation of the Act because the operating companies relied heavily on AT&T for such advice and not for the purpose of instructing the operating companies to maintain their Centrex rate structures unchanged. Other

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footnote 73 cont'd

package described in AT&T's April 1961 material, *see* pp. 34-36 *supra*. Moreover, over half of the companies did not offer station hunting, a supplemental service recommended by AT&T.

(74) *See* n. 84 *infra*.

evidence also shows that the operating companies continued to exercise independent judgment in connection with their Centrex tariffs. Arthur X. Ichter, the rate supervisor for defendant Bell Telephone Company of Pennsylvania, testified that he independently decided that Bell of Pennsylvania and Diamond State Telephone Company, for which he also did rate work, should establish separate charges before he learned that AT&T was considering the same step. Several other operating companies began work on establishing separate charges before receiving AT&T's recommendations. Finally, a number of the operating companies rejected AT&T's recommended method of establishing separate charges and developed their own method.

While it is true that none of the defendants modified their Centrex rate structure until 1971, this by itself does not establish that there was concerted action.(75) The evidence establishes not only that it was not against the interests of each individual defendant to maintain the package rate, as plaintiffs contend, but that in fact there were legitimate business reasons for this parallel behavior sufficient to negate any inference that it was the result of an agreement among the defendants. These reasons included the widespread acceptance of Centrex rates, its ready marketability, the burden of filing new tariffs, the possibility of a time-consuming and costly challenge before regulatory commissions or by the Internal Revenue Service, and the expected elimination of the excise tax. Under these circumstances the defendants' maintenance of a rate structure which was apparently proving successful and profitable does not give rise to any inference that they conspired to do so. (76)

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(75) *See* pp. 22-23 *supra*.

In sum, upon the totality of the relevant and probative evidence in the case, including the testimony of those witnesses who testified at the trial, which the Court accepts as credible, the plaintiffs have failed to establish their claim that the defendants entered into any conspiracy relating to Centrex rates. In essence, the plaintiffs attempt to base an inference of conspiracy upon the facts that during the relevant period AT&T made certain recommendations to the operating companies and that the operating companies generally followed those recommendations. But the evidence fails to establish that there was a "common design and understanding"(77) among the defendants; rather, each operating company exercised its own independent judgment and was free to accept or reject AT&T's recommendations in whole or in part.

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(76) *Cf*. American Tel. & Tel. Co. v. Delta Communications Corp., 408 F. Supp. 1075, 1097 (S.D. Miss. 1976). Similarly, those companies who filed initial Centrex tariffs after 1965 logically chose to adopt a similar rate structure.

e. Restraint of Trade - Price Fixing

The determination that plaintiffs have failed to establish the first essential element of their claim should conclude the matter. However, since there may be appellate review, it is desirable to consider whether plaintiffs have established the other essential element of their antitrust charge. Even were the Court to find that the defendants entered into the twin agreements alleged by plaintiffs, namely one in 1961 to fix a uniform Centrex rate structure and one after 1965 not to establish separate charges for exchange access and intercommunication, to prevail plaintiffs must establish that those agreements were in restraint of trade. Plaintiffs' most vigorously pressed contention in this regard is that the alleged conspiracy was price fixing and should be declared per se illegal. While recognizing that the agreements alleged herein do not precisely fit the mold of a classic price fixing conspiracy, plaintiffs argue that they are sufficiently similar to price fixing to be treated as such. As set forth in their pretrial brief, plaintiffs' claim is as follows:

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(77) See p. 21 supra.

> The purpose of the conspiracy was to avoid scrutiny of Centrex rates, including the artificial Centrex-CO and Centrex-CU near uniformity, and to avoid competitive erosion of the rates. The purpose was, in sum, to maintain and stabilize the Centrex rate structure -- i.e., prices -- albeit not at a single rate level but at whatever the then current charge was in each defendant operating company's tariff. But maintaining the package Centrex rate acted directly to increase the price paid by Centrex customers. By their uniform action, the defendants increased the price paid by each plaintiff in an amount equal to the federal communication excise tax collected on the intercommunication portion of their Centrex service.
>
> The conspiracy in the present case raised the price of the service it marketed by a measurable amount -- and maintained rigid control over the price level until the agreement to maintain the rate structure was replaced in 1971. It was a conspiracy to fix prices within the meaning of the decided cases, and was unlawful per se.

Despite plaintiffs' ingenious argument, however, the Court is convinced that the alleged conspiracy is not price fixing. There are significant differences between the conspiracy alleged here and the ordinary price fixing conspiracy among horizontal competitors.(78) The defendants are affiliated corporations which do not compete with each other in providing telephone service and which are regulated monopolists in their respective service areas. The actual relationship among the defendants -- the so-called "federal system" (79) -- and their affiliation in a nation-wide telephone system distinguish this case from a case of price fixing among independent competitors. (80) Moreover, while the plaintiffs claim that the equivalent of competition exists among the defendants, in that a decision by one operating company to establish separate charges would have led customers and regulatory commissions to

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(78) Plaintiffs contend that the conspiracy can be viewed as a vertical one between AT&T and its subsidiaries because of

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footnote 78 cont'd

> the license agreements between them. This claim is without merit. Vertical price fixing is an agreement between a supplier and a customer fixing the resale price of a commodity, as in Albrecht v. Herald Co., 390 U.S. 145 (1968); Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. Parke, Davis & Co., 362 U.S. 29 (1960). *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972); Knuth v. Erie-Crawford Dairy Coop. Ass'n, 326 F. Supp. 48, 53 (W.D. Pa. 1971), *aff'd in part and rev'd in part on other grounds*, 463 F.2d 470, 475 (3d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973). The operating companies do not purchase Centrex service from AT&T; their relationship is thus not the sort of vertical one that leads to per se condemnation.

(79) *See* p. 4 *supra*.

(80) *See* United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 113-14 (1975).

put pressure on the others to do likewise, the absence of actual competition militates against application of the per se rule.(81)

Second, to be considered price fixing the agreements must have restricted the operating companies' freedom to set prices according to their own business judgment.(82) "Conduct or agreements not restricting a competitor's pricing independence . . . falls short of illegal price fixing."(83) In this case the alleged conspiracy did not limit the pricing decisions of any operating company. It related solely to the structure of Centrex rates -- namely the package rate and single offering -- and had no effect whatsoever on the charge for Centrex service. As the plaintiffs themselves state, "[r]ate levels as such are not at issue here. Rate structure is." Each operating company was free to set its Centrex rates at whatever level it desired, subject of course to the approval of regulatory commissions. Indeed, the stipulated facts reveal that there was great variation in the rates charged for Centrex service.(84) As previously noted, the evidence does not establish that these rates were in any way excessive, or that the alleged agreement among defendants affected them in any other way.(85)

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(81) Evans v. S.S. Kresge Co., 544 F.2d 1184, 1192-93 (3d Cir. 1976), cert. denied, 45 U.S.L.W. 3840 (U.S. June 27, 1977); United States v. Columbia Pictures Corp., 169 F. Supp. 888, 893 (S.D.N.Y. 1959); see Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568, 572-73 (D. Md. 1975). In any event, the Court finds that such "competition" did not exist. See pp. 74-75 infra.

(82) Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951); Chisholm Bros. Farm Equip. Co. v. International Harvester Co., 498 F.2d 1137, 1142 (9th Cir.), cert. denied, 419 U.S. 1023 (1974); Adolph Coors Co. v. FTC, 497 F.2d 1178, 1184 (10th Cir. 1974), cert. denied, 419 U.S. 1105 (1975); Merit Motors, Inc. v. Chrysler Corp., 417 F. Supp. 263, 267 (D.D.C. 1976); Jacobi v. Bache & Co., 377 F. Supp. 86, 95-96 (S.D.N.Y. 1974), aff'd, 520 F.2d 1231 (2d Cir. 1975), cert. denied, 423 U.S. 1053 (1976); Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F. Supp. 945, 952 (S.D. Tex. 1972); Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705, 720 (D. Hawaii 1964); see United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24 (1940); cf. Arizona v. Cook Paint & Varnish Co., 391 F. Supp. 962, 966-67 (D. Ariz. 1975), aff'd, 541 F.2d 226 (9th Cir. 1976), cert. denied, 97 S. Ct. 1327 (1977).

(83) Checker Motors Corp. v. Chrysler Corp., 283 F. Supp. 876, 882-83 (S.D.N.Y. 1968), aff'd, 405 F.2d 318, 322-23 (2d Cir.), cert. denied, 394 U.S. 999 (1969).

The only effect the plaintiffs have actually shown upon the "price" of Centrex service is that Centrex subscribers paid more excise tax than if separate charges had been established. However, the Federal excise tax is not part of the price of telephone service; rather it is imposed on the price paid for that service.(86) The tax is imposed on the plaintiffs; the defendants are merely the collecting agents for the government(87) and are not the beneficiaries of the tax. They retained none of the taxes collected from the plaintiffs but paid them over to the United States as required by law. When separate charges were established, the Centrex rates paid by the plaintiffs to the defendants remained the same; only the taxes plaintiffs paid to the government decreased. Under these circumstances, any agreement among the defendants to establish a uniform rate structure, which had as an incidental effect an increase in the tax paid by customers, cannot by reason of the tax increase alone constitute price fixing.

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(84) On January 1, 1963, the operating companies' rates for the first 50 Centrex stations of a subscriber varied from $6.30 per station to $11.50 per station; on January 1, 1966, those rates varied from $6.30 to $16.50. Similar variations existed at other levels of the defendants' Centrex rate structures, which were tapered so that a subscriber paid a lower rate per station when he required a large number of stations.

(85) See pp. 51-53 supra.

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(86) I.R.C. §§ 4251 ("[T]here is hereby imposed on amounts paid for the following communication services a tax . . ."), 4254 ("If a bill is rendered the taxpayer for local telephone service . . . the amount on which the tax with respect to such services shall be based shall be the sum of all charges for such services included in the bill"); see Carrigan v. Sunland-Tujunga Tel. Co., 263 F.2d 568, 571 (9th Cir.), cert. denied, 359 U.S. 975 (1959). But see Agron v. Illinois Bell Tel. Co., 449 F.2d 906, 912-13 & n.13 (7th Cir. 1971), cert. denied, 405 U.S. 954 (1972).

(87) See generally DuPont Glore Forgan Inc. v. American Tel. & Tel. Co., 428 F. Supp. 1297 (S.D.N.Y. 1977).

Nor was the purpose of the alleged conspiracy the fixing of Centrex prices. A uniform Centrex rate structure was desired, not to fix the price for Centrex service, but to enable it to be provided as efficiently as possible and to facilitate marketing.(88) Similarly, even if defendants agreed not to file separate charges after passage of the Act, this agreement was not motivated by a purpose to protect Centrex rates from regulatory scrutiny but rather, as previously noted, by a desire to avoid the expense and burden of filing new tariffs and by the anticipated demise of the excise tax. Thus, neither the purpose nor the effect of the agreement among the defendants was to restrict the operating companies' pricing freedom.

Thus the conspiracy which the plaintiffs claim the defendants entered into is unlike the typical price fixing conspiracy in several important respects and should not be subject to the per se rule. The rationale of the per se rule is that certain classes of agreement are so familiar and their anticompetitive effects so well known that the courts will not engage in the detailed factual inquiry necessary to establish those effects in each case but will declare them illegal as a class. However, "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act."(89) In this case, as the Supreme Court stated in White Motor Company v. United States:(90)

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(88) See pp. 36-40 supra.

> We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" . . . and therefore should be classified as per se violations of the Sherman Act.

f. Restraint of Trade - Rule of Reason

Plaintiffs alternatively contend that the agreement among the defendants violated the "rule of reason."(91) Mr. Justice Brandeis' formulation remains the classic definition of an unreasonable restraint of trade:

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(89) United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972); see Continental T.V., Inc. v. GTE Sylvania Inc., 45 U.S.L.W. 4828, 4831-32 & n.16 (U.S. June 23, 1977); White Motor Co. v. United States, 372 U.S. 253, 263 (1963); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

(90) 372 U.S. 253, 263 (1963). See also Evans v. S.S. Kresge Co., 544 F.2d 1184, 1190-91 (3d Cir. 1976), cert. denied, 45 U.S.L.W. 3840 (U.S. June 27, 1977); Arizona v. Cook Paint & Varnish Co., 391 F. Supp. 962, 967 (D. Ariz. 1975), aff'd, 541 F.2d 226 (9th Cir. 1976), cert. denied, 97 S. Ct. 1327 (1977).

(91) See p. 23 supra.

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.(92)

Measured against this standard, plaintiffs have not shown that the alleged conspiracy constituted an unreasonable restraint of trade, for many of the reasons previously discussed. Plaintiffs have failed to show that the conspiracy had any substantial anticompetitive effect. Several factors lead to this conclusion. First, plaintiffs contend merely that the defendants agreed to establish and maintain a uniform Centrex rate structure. Such agreements, even assuming their existence, limited the defendants' economic freedom only slightly, since they did not restrict any operating company's ability to offer Centrex at whatever price it desired with whatever service features it desired, or even not to offer Centrex at all, as the tariffs actually filed demonstrate. Second, each of the operating companies' telephone service is regulated by state law. State and local regulatory commissions are empowered to assure the fairness and reasonableness of defendants' tariffs, including the Centrex tariffs at issue here.(93) Each of the defendants' tariffs was allowed to become effective by the appropriate regulatory commissions. So far as appears from the record no commission disapproved of the defendants' Centrex tariffs on any ground between 1961 and 1972. Plaintiffs argue, however, that the conspiracy was directed at regulatory authorities as well as customers and was intended to undermine their ratemaking activities -- and their safeguarding of customers' interests -- by avoiding regulatory review of Centrex rates.

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(92) Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918); accord, Continental T.V., Inc. v. GTE Sylvania Inc., 45 U.S.L.W. 4828, 4831 n.15 (U.S. June 23, 1977); White Motor Co. v. United States, 372 U.S. 253, 261-62 (1963).

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(93) E.g., Cal. Pub. Util. Code §§ 451, 454, 455 (West 1975); Fla. Stat. Ann. §§ 364.03, 364.14 (West 1968); Ill. Rev. Stat. ch. 111 2/3, §§ 32, 36, 41 (1973); Mass. Ann. Laws ch. 159, §§ 14, 17, 19 (Michie/Law.Co-op 1970); N.Y. Pub. Serv. L. §§ 91, 97 (McKinney 1955); Ohio Rev. Code Ann. §§ 4905.22, 4909.17, 4909.18 (Page 1977).

This contention, repeatedly pressed, assumes that the public agencies were derelict in carrying out their statutory duties. Nothing has been presented to support this claim.

Finally, as already noted, there was in fact no competition among the defendants to be restrained. Since each operating company is a legal monopolist within its service area, a subscriber who desired Centrex service had no choice of which defendant to obtain it from or what price to pay. In fact, to the extent the alleged conspiracy had any impact on competition it benefitted the defendants' only competitors, by subjecting Bell System Centrex service to the excise tax while non-Bell System intercommunication systems were not taxed, enabling the latter to compete more effectively with the operating companies in the sale of intercommunication equipment. In addition, the defendants were all affiliated members of a single Bell System, not independent competitors. Thus, even in the absence of the alleged agreement there was no competition among the defendants to be restrained.

Plaintiffs claim, however, that this agreement did restrain competition among the defendants, because "the conspirators' pricing decisions, if made independently, would have had some impact on each other -- i.e., . . . they had an anticompetitive reason for agreeing to maintain uniform prices." According to plaintiffs, if one operating company, acting independently, had established separate charges for exchange access and intercommunication after the Act was passed, those of its subscribers who also received Centrex services from other operating companies in other service areas would put pressure on those operating companies to establish separate charges, thus setting in motion a chain reaction. However, although some subscriber pressure did develop in 1971 when separate charges were established, concern about such pressure did not motivate the defendants at any time. In fact uniformity of Centrex rate structure was desired, not to forestall customer pressure to establish separate charges or for lower rates, but to facilitate ease of marketing and customer understanding of Centrex by providing a similar service in each jurisdiction. A second factor favoring uniformity after 1965 was the desire to have all the Bell System companies apply the excise tax similarly to secure a single uniform ruling from the Internal Revenue Service. In sum, there was no competition among the defendants to be restrained, even accepting plaintiffs' expanded definition of "competition."(94)

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(94) The cases cited by plaintiffs do not support their proposition. In cases involving division of markets, such as

Not only did the conspiracy have no substantial anticompetitive effect, but it was undertaken for no anticompetitive purpose. The Court has already noted that the reasons for establishing a uniform Centrex rate structure, with a package rate, single offering, and reservation of choice to the operating company, were in large measure related to providing Centrex in the most efficient manner possible, by ensuring that the operating companies could use the most economical type of equipment in each situation. While plaintiffs characterize the defendants' desire for efficiency as an anticompetitive motive, the ultimate beneficiaries of any savings effected were the subscribers. If the operating companies had been forced to retire $600,000,000

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footnote 94 cont'd

United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); and Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), the illegality is based on the fact that, but for the agreement, there would likely have been actual competition among the defendants. Here there would never have been such competition. United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973), was decided under § 7 of the Clayton Act, as amended, 15 U.S.C. § 20, which was "intended to reach incipient monopolies and trade restraints outside the scope of the Sherman Act." Brown Shoe Co. v. United States, 370 U.S. 294, 318 & nn. 32, 33 (1962); see United States v. Falstaff Brewing Corp., 410 U.S. 526, 555-58 (1973) (Marshall, J., concurring).

of PBX switching equipment in advance of full depreciation, or if they had allowed Centrex subscribers to choose whichever type of service they desired regardless of cost, the resulting increase in operating cost and capital investment would have been passed on to subscribers in the normal course of events. Similarly, as previously stated, the reason Centrex charges were not separated immediately after passage of the Act was not to attempt to shield excessive or discriminatory rates, but to try to prevent unnecessary expenditures in connection with the filing of new tariffs. The alleged agreement was neither anticompetitive nor unreasonable.

Thus, the plaintiffs have not prevailed on their antitrust claim. The defendants entered into no contract, combination or conspiracy to establish and maintain a uniform Centrex rate structure; in any event, any such agreement would not have constituted an unreasonable restraint of trade in the circumstances of this case. (95)

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(95) In light of this decision it is unnecessary to consider several claims advanced by defendants with respect to the antitrust charges. Defendants contend that, even if their actions violated the antitrust laws, plaintiffs cannot recover treble damages because the defendants' Centrex rates were embodied in tariffs filed with public utility regulatory commissions. See Georgia v. Pennsylvania R.R., 324 U.S. 439, 453 (1945); Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922). Each of these cases involved tariffs filed

III. BREACH OF DUTY CLAIM

The second theory upon which plaintiffs seek recovery is that the Act, when construed in the context of the excise tax collection provisions of the Internal Revenue Code,(96) Article I, Section 8, of the United States Constitution, sections 201 and 202 of the Federal Communications Act,(97) state

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footnote 95 cont'd

with the Interstate Commerce Commission, a federal agency, and thus involved the proper harmonization of two federal statutes, whereas the case at bar involves allegedly conflicting federal and state law. See generally Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). Significantly different considerations may be applicable in each case. See Litton Systems, Inc. v. Southwestern Bell Tel. Co., 539 F.2d 418, 420-24 (5th Cir. 1976); Handler, Twenty-Fourth Annual Antitrust Review, 72 Colum. L. Rev. 1, 14 (1972).

Defendants also contend that the plaintiffs were not injured in their business or property as required by § 4 of the Clayton Act, 15 U.S.C. § 15, and that they have not shown the requisite effect upon interstate commerce.

(96) I.R.C. §§ 4251, 4291, 7501; see generally DuPont Glore Forgan Inc. v. American Tel. & Tel. Co., 428 F. Supp. 1297 (S.D.N.Y. 1977).

(97) 47 U.S.C. §§ 201, 202. Section 201 requires that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service, shall be just and reasonable"; section 202 makes it unlawful for telephone companies "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with [interstate or foreign] communication service."

statutes regulating telephone companies as public utilities, and common law principles, (98) imposed upon the defendant operating companies an obligation, owed to members of the plaintiff class, to establish separate Centrex station charges for exchange access and intercommunication within the meaning of the Act. Plaintiff claim that since the defendants failed to establish such separate charges within a reasonable time, in violation of this alleged duty, they are liable to plaintiffs for the amount of tax collected on the intercommunication portion of their Centrex service. (99)

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(98) While the plaintiffs analogize the defendants' role to that of a corporate fiduciary, cf. Oil & Gas Ventures -- First 1958 Fund, Ltd. v. Kung, 250 F. Supp. 744, 749 (S.D.N.Y. 1966), they expressly disclaimed any contention that the defendants actually had any such common law duty, and base their claim entirely upon the Act. Cf. Board of Public Util. Comm'rs v. New York Tel. Co., 271 U.S. 23, 31 (1926); Jacob Goodman & Co. v. New York Tel. Co., 285 App. Div. 404, 408, 137 N.Y.S.2d 797, 800, aff'd, 309 N.Y. 258, 128 N.E.2d 406 (1955).

(99) Defendants contend that even if the Act did impose such a duty upon them, the Court should not entertain a private right of action for violation of that duty because Congress did not explicitly create such a cause of action and the area of public utility regulation is traditionally left to state law. See Santa Fe Indus., Inc. v. Green, 97 S. Ct. 1292, 1301-04 (1977); Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926, 947-49 (1977); Cort v. Ash, 422 U.S. 66, 78-85 (1975). In view of the Court's decision, this issue need not be decided.

The statute itself merely states that tax-exempt private communication service "does not include any communication service unless a separate charge is made for such service."(100) Plaintiffs, recognizing that this language does not expressly impose any duty upon defendants, contend that such a duty is implicit in the legislative history and context in which the Act was passed. The Congressional committee reports noted that "it is understood" that Centrex systems "do not, as yet," provide separate charges for exchange access and intercommunication, and that "[u]ntil such a separation is made," Centrex service would continue to be taxed.(101) This language cannot fairly be read to impose upon the defendants the duty to establish separate charges;(102) rather, it reflects recognition by Congress of existing facts, including the possibility that separate charges might be established in the future.

Plaintiffs point, however, to statements in the legislative history indicating that the benefits of the Act should be passed through to consumers (103) from which they seek to infer that a duty was imposed upon the defendants to make these benefits available within a reasonable time. However, these statements do not refer specifically to the Act's private communication service provisions, which were but a small part of the general reduction and elimination of a wide variety of excise taxes accomplished by the Act. In fact, a reading of the Congressional committee reports makes it clear that, while the provisions for a phased repeal of the communications excise tax were intended to benefit subscribers, the removal of taxes on private communication service was primarily for the benefit of the defendants themselves, to enable them to compete with non-Bell System companies. (104) In addition, it was recognized in colloquy on the Senate floor that Congress' hope that the benefits of the general excise tax reductions of the Act would be passed on to consumers did not create an enforceable duty to do so, because there was "no authority . . . to stop retailers from increasing their prices, or keeping as profit the full amount of the tax reduction."(105)

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(100) I.R.C. § 4252(d).

(101) H. Rep. at 1677; S. Rep. at 1726. This section of the committee reports is quoted more fully supra p. 18.

(102) Cf. Hughes v. United States, 342 U.S. 353, 356 (1952).

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(103) Public Papers, Lyndon B. Johnson, 1965 Vol. 2, No. 326. See also 111 Cong. Rec. 12330 (1965) (remarks of Rep. Pucinski); 111 Cong. Rec. 13624-25, 14073 (1965) (remarks of Sen. Long).

(104) Compare H. Rep. at 1677; S. Rep. at 1726 with H. Rep. at 1676; S. Rep. at 1724-25.

Plaintiffs contend, however, that the Court must judicially imply such a duty from the Act to avoid "an impermissible, standardless delegation of Congressional taxing power to defendants." They claim that by virtue of the defendants' multiple roles in connection with the Act -- as lobbyists, beneficiaries of the Act, providers of telephone service, and statutory collecting agents -- defendants had, in effect, plenary discretion to decide whether or not the excise tax would be imposed upon Centrex service, by their decision whether or not to establish separate charges for exchange access and intercommunication. Such uncontrolled discretion, plaintiffs argue, would constitute a standardless delegation of the Congressional power to "lay and collect Taxes, Duties, Imposts and Excises."(106) Plaintiffs contend that such a delegation of the Congressional taxing power might raise serious constitutional questions(107) and therefore urge the Court to construe the Act as imposing a duty upon the defendants to act reasonably in establishing separate charges.(108)

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(105) 111 Cong. Rec. 13624 (1965) (remarks of Sen. Nelson). The statement in text came during debate of an amendment, proposed by Senator Nelson, which would have required the Council of Economic Advisers to report annually to Congress on the economic effects of the excise tax reductions, and in particular whether the benefits were being passed through to consumers. Senator Nelson stated that his amendment, which was passed by the Senate but dropped in conference on the ground that the Council already intended to make such a study, see 111 Cong. Rec. 14072-73 (1965), was offered because the Act did not prevent any person from retaining for himself the benefits of the tax, and to ensure that Congress found out if that occurred. Senator Long, supporting the amendment, referred specifically to the telephone tax repeal, and the possibility that the benefits of that repeal would not be passed on to consumers, thus indicating a belief that even to the extent it was intended to benefit consumers the Act did not impose any duty on telephone companies. 111 Cong. Rec. 13624-25 (1965).

However, plaintiffs' major premise is erroneous. There has been no delegation of the Congressional power to tax. That power comprehends the determination of what transactions, facilities or services will be taxed and at what rate.(109) Congress has fully exercised that power here. It has provided that, while other types of telephone service are taxed, private communication service for which a separate charge is made shall be exempt from tax. The fact that, in a given case, a separate charge may or may not be made does not constitute an unconstitutional delegation of Congressional power. It merely determines whether or not the duly enacted tax applies in each instance.(110) As the Court of Appeals for the Ninth Circuit said in a case in which a similar claim was made:

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(106) U.S. Const., Art. I, § 8.

(107) See National Cable Television Ass'n v. United States, 415 U.S. 336, 340-42 (1974); cf. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

(108) See National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974); United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); Lynch v. Overholser, 369 U.S. 705, 710-11 (1962); International Ass'n of Machinists v. Street, 367 U.S. 740, 749-50 (1961); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring); Crowell v. Benson, 285 U.S. 22, 62 (1932); cf. Steele v. Louisville & N. R.R., 323 U.S. 192, 198-99 (1944).

> The Internal Revenue Code imposed federal taxes, as it had a right to do. The [California Public Utilities] Commission fixed the telephone rates, as it had a right to do. The Commission's rates had nothing to do with the federal tax and the federal tax had nothing to do with fixing the rates, but was on them as fixed.(111)

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(109) *Cf.* Helvering v. Stuart, 317 U.S. 154, 162 (1942); Morgan v. Commissioner, 309 U.S. 78, 80-81 (1940); Flint v. Stone Tracy Co., 220 U.S. 107, 167 (1911).

(110) Helvering v. Lerner Stores Corp., 314 U.S. 463, 466-48 (194 *see* Rochester Gas & Elec. Corp. v. McGowan, 115 F.2d 953, 955 (2d Cir. 1940); *cf.* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 407 (1928).

(111) Carrigan v. Sunland-Tujunga Tel. Co., 263 F.2d 568, 571 (9th Cir.), *cert. denied*, 359 U.S. 975 (1959).

There are numerous instances in the Internal Revenue Code where the application of a particular tax depends on the way a transaction is structured or upon choices made by the parties thereto;(112) the Code does not prescribe the form such transactions must take but merely taxes them as they are carried out by the parties. To hold that this constitutes an unconstitutional delegation of the taxing power would virtually require Congress to legislate specially the taxability of each transaction, so as to eliminate the ability of the parties to affect the application of the tax. Similarly, the application of the Internal Revenue Code may depend upon the incidents of property created by state law,(113) but that does not constitute an abdication of Congressional authority.(114)

Plaintiffs recognize the general rule but urge that a different result should be reached here because of the defendants' "multiple and overlapping roles." Their arguments have no force. Plaintiffs refer to the defendants' duties of fairness and nondiscrimination under federal (115) and state (116) law; however, they have presented no proof that the defendants have violated the statutes to which they refer. They rely upon the fact that defendants, as statutory collecting agents, computed and collected the tax; but they do not claim that the tax was in any respect incorrectly computed or collected. Finally, they claim that, in light of the defendants' lobbying activities, the Act should be considered similar to a "private bill" and construed strictly against the defendants. (117) However, the Act was not a "private bill" but a revenue enactment of general application. (118) Lobbying in connection with taxation bills is by no means uncommon; the fact that a person has been a leader of a lobbying group in a matter of public importance should not subject the lobbyist to a judicially created fiduciary duty of uncertain scope when Congress has not created such a duty.(119) In sum, the Act imposed no duty upon the defendants to establish separate charges for exchange access and intercommunication.(120)

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(112) For example, under I.R.C. § 368 the precise form taken by a corporate reorganization can affect its taxability. Under I.R.C. § 152(c) taxpayers can choose which of them will claim an individual they jointly support as a dependent, if certain conditions are met. See generally Helvering v. Lerner Stores Corp., 314 U.S. 463, 468 (1941).

(113) See, e.g., United States v. Mitchell, 403 U.S. 190, 197 (1971); Morgan v. Commissioner, 309 U.S. 78 (1940); Blair v. Commissioner, 300 U.S. 5, 9-10 (1937).

(114) Phillips v. Commissioner, 283 U.S. 589, 602 (1931).

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(115) 47 U.S.C. §§ 201, 202, quoted supra n. 97. The parties have stipulated that Centrex charges are not subject to federal regulation. See 47 U.S.C. §§ 152(b), 221(b).

(116) E.g., Cal. Pub. Util. Code §§ 451, 453 (West 1975); Fla. Stat. Ann. §§ 364.03, 364.08, 364.09, 364.10 (West 1968); Ill. Rev. Stat. ch. 111 2/3, §§ 32, 37, 38, 39 (1973); Mass. Ann. Laws ch. 159, §§ 14, 17, ch. 166, § 14 (Michie/Law. Co-op. 1970); N.Y. Pub. Serv. L. §§ 91, 92 (McKinney 1955 & Supp. 1976); Ohio Rev. Code Ann. §§ 4905.22, 4905.33, 4905.34, 4905.35, 4909.18 (Page 1977).

(117) See United States v. Goltra, 312 U.S. 203, 210-11 (1941); Blair v. City of Chicago, 201 U.S. 400, 471 (1906).

(118) Cf. Garner v. Teamsters Local 776, 346 U.S. 485, 494 (1953).

Accordingly, the complaint is dismissed in its entirety upon the merits.(121) The foregoing, together with

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(119) Indeed to hold that lobbying could create a fiduciary duty might burden the exercise of fundamental constitutional rights. *Cf.* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

(120) The identical claim was rejected in McDonnell-Douglas Corp. v. General Telephone Co. of Calif., No. 74-378-F (C.D. Cal. July 7, 1975).

(121) Thus, the Court need not consider a final defense raised by nineteen of the operating companies which are not incorporated in New York State and do not provide telephone service there. They contend that venue is improper in the Southern District of New York because they are neither found nor transacting business in this district, despite the fact that each was party to at least one contract with New York contacts, received goods shipped from New York, and had officers or employees in New York from two to eight days each month during the relevant period. 15 U.S.C. § 22. *See* United States v. Scophony Corp. of America, 333 U.S. 795, 807 (1948); In re Chicken Antitrust Litigation, 407 F. Supp. 1285, 1291-92 (N.D. Ga. 1975); Abrams v. Bendix Home Appliances, Inc., 96 F. Supp. 3, 5 (S.D.N.Y. 1951).

the facts stipulated in the pretrial order, shall constitute the Court's Findings of Fact and Conclusions of Law.

Dated: New York, New York
July 19, 1977

United States District Judge

OPINION DATED MARCH 23, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

DUPONT GLORE FORGAN INCORPORATED,
et al.,

Plaintiffs,

-against-

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY, et al.,

Defendants and Third-
Party Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Third-Party Defendant.

- x

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OPINION

45721

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Opinion dated March 23, 1977

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Opinion dated March 23, 1977

EDWARD WEINFELD, D. J.

Plaintiffs commenced this class action to recover communications excise taxes which they allege were over-collected by defendants, acting as statutory collecting agents for the government. The plaintiffs are users of "Centrex" systems,(1) a form of telephone service used primarily by businesses and other large organizations, which permits communication between different telephones within one office as well as outside communications. The defendants are the American Telephone and Telegraph Co. ("AT&T") and twenty-three affiliated operating companies. The defendants have served a third-party complaint seeking recovery from the United States in the event plaintiffs prevail in their action.

Section 4251 of the Internal Revenue Code of 1954(2) ("the Code") imposes an excise tax on telephone and other communications services and facilities.(3) The tax is imposed on the person who pays for the service or facility ("taxpayer") but the company providing the service or facility ("collecting agent") is obligated to collect the tax from the taxpayer and remit it to the government.(4) Pursuant to the Excise Tax Reduction Act of 1965,(5) however, no such tax is imposed upon "private communication service" such as intra- [illegible] communication by means of Centrex systems, provid[illegible] "a separate charge is made for such service."(6)

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(1) Previously the Court ordered that this suit could be maintained as a class action under Rule 23(b)(3), Fed. R. Civ. P., on behalf of all users of Centrex systems. DuPont Glore Forgan Inc. v. American Telephone & Telegraph Co., 69 F.R.D. 481 (S.D.N.Y. 1975). That opinion expressly reserved the issue now presented. Id. at 489 n.24.

(2) 26 U.S.C. § 4251.

The complaint contains eight counts.(7) In substance, Counts I, III and V allege that the defendants' failure to make separate charges for intra-office communication service provided by Centrex systems between 1966 and 1972 violated federal statutory and common law fiduciary duties. Counts VII and VIII allege violations of the federal antitrust laws. Counts II, IV and VI allege that the entries on defendants' books for Centrex service satisfied the "separate charge" requirement, as interpreted in a ruling of the Internal Revenue Service,(8) and that therefore plaintiffs were not required to pay the excise tax upon the intra-office communications service provided by Centrex.

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(3) In 1970, Congress enacted a ten-year program gradually eliminating the communications excise tax, commencing January 1, 1973. P.L. 91-614, 84 Stat. 1836, § 201 (b).

(4) 26 U.S.C. §§ 4251(a)(1), 4291, 7501.

(5) P.L. 89-44, 79 Stat. 136, § 302.

(6) 26 U.S.C. §§ 4251(a), 4252(a), (d).

(7) Counts I and II are brought against AT&T on behalf of all users of Centrex systems who were customers of any operating telephone company at any time between January 1, 1966, and December 31, 1972. Counts V, VI, VII and VIII are brought on behalf of the same class against all the defendants. Counts III and IV are brought against AT&T and New York Telephone Company on behalf of all users of Centrex systems who were customers of New York Telephone Company at any time between January 1, 1966 and December 31, 1972.

The defendants now move for summary judgment only on Counts II, IV and VI upon the ground that these counts assert claims for refund of taxes, which can be maintained only against the United States; alternatively, they seek partial summary judgment on these counts as to those members of the plaintiff class who have not filed administrative claims for refunds. The United States supports the defendants' motion and in addition has moved for summary judgment on the third-party complaint.

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(8) Rev. Rul. 69-152, 1969-1 Cum. Bull. 289, held that the "separate charge" requirement of §4252(d) is met where there are telephone company records which identify in precise detail the monthly charges for equipment and service relating to private communication service and such specific detail is furnished to a telephone subscriber upon request, even though the monthly billings to the subscriber do not show charges for private communication service separately.

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Counts II, IV and VI of the complaint allege that "[s]ince the separation of the charges existed on the books of the defendants," the excise tax was not due upon the intra-office communication service, but that nonetheless

> defendants collected, or caused to have been collected, a greater amount in excise taxes from plaintiffs and members of the class than they were entitled to collect, or cause to be collected, under the law, and plaintiffs and members of the class were required to pay and did pay to the [defendants] excise taxes which were not in fact due.(9)

The language of the complaint is thus cast solely in terms of a refund of overcollected taxes. Significantly, there is no allegation of breach of statutory or common law duty, or of violations of the antitrust laws, as alleged in the other counts. So, too, there is no dispute that all sums collected from plaintiffs by defendants were timely paid over by them to the United States as required by law. Thus, it is apparent that the issue to be addressed in these counts is essentially the same as would be presented in a tax refund suit: whether or not separate charges were made, which would determine the extent of plaintiffs' liability for the communications tax. However, the plaintiffs have chosen not to seek a return of the allegedly overcollected tax in a refund suit against the government, but rather have sued the defendants, who collected the tax from them and remitted it to the government. In support of their motion for summary judgment, defendants contend in essence that the tax refund provisions of the Code were intended by Congress to prohibit any suit against collecting agents such as themselves, and that plaintiffs therefore cannot maintain this suit against defendants but must sue the government.

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(9) Complaint, ¶¶ 36, 37.

The question is close and not entirely free from doubt, but the Court is persuaded that an overall view of the tax collection and refund provisions of the Code, and of the mandated role of non-governmental collecting agents such as defendants, shows that aggrieved taxpayers such as plaintiffs must bring their suit against the government. A brief examination of the refund procedures established by the Code is necessary to an understanding of the issues involved. The Code provides that a taxpayer seeking a refund of taxes (10) must first make an administrative claim for refund within three years from the time his return was filed (or two years from the date the tax was paid, whichever is later) or, if no return was filed, within two years from the time the tax was paid. (11) He cannot bring suit until either the refund claim has been acted upon or six months have elapsed since it was filed. (12) In no event can suit be brought more than two years after the claim has been disallowed. (13) Refund suits can be brought only in accordance with these procedures, (14) which serve two functions. First, they afford the Internal

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(10) The alternate method of contesting tax liability by appealing a notice of deficiency to the Tax Court is unavailable in the case of these excise taxes. 26 U.S.C. §§ 6211-14; Flora v. United States, 362 U.S. 145, 175 n. 38 (1960); 9 J. Mertens, Law of Federal Income Taxation § 50.08 (Zimet Rev. 1974).

(11) 26 U.S.C. §§ 6511(a), 7422(a).

(12) 26 U.S.C. § 6532(a)(1).

(13) *Id.*

(14) *See*, *e.g.*, United States v. Felt & Tarrant Mfg. Co., 283 U.S. 269 (1931); Lewis v. Sandler, 498 F.2d 395, 399-400 (4th Cir. 1974); Scovill Mfg. Co. v. Fitzpatrick, 215 F.2d 567, 569 (2d Cir. 1954); United States v. Standard Oil Co., 158 F.2d 126, 129 (6th Cir. 1946), *cert. denied*, 331 U.S. 836 (1947) ("Meticulous compliance by a taxpayer with conditions prescribed for the recovery of taxes paid must appear before the taxpayer can recover.") *See also* cases cited n. 39 *infra*.

Revenue Service an opportunity to investigate tax claims and resolve them without the time and expense of litigation.(15) Second, they protect the Treasury by providing strict limitations periods for tax refund suits.(16)

Section 7422 of the Code,(17) upon which defendants rely, is persuasive evidence that an action against the government in accordance with these provisions of the Code was intended to be the exclusive remedy for a tax refund. Section 7422 reads, in relevant part:

> (a) No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.
>
> . . . .

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(15) See United States v. Felt & Tarrant Mfg. Co., 283 U.S. 269, 272 (1931); Herrington v. United States, 416 F.2d 1029, 1032 (10th Cir. 1969); Lemoge v. United States, 378 F. Supp. 228, 232 (N.D. Cal. 1974).

(16) See United States v. Memphis Cotton Oil Co., 288 U.S. 62, 71 (1933); cf. Burnett v. New York Central R.R., 380 U.S. 424, 428 (1965).

(17) 26 U.S.C. § 7422.

> (f) (1) A suit or proceeding referred to in subsection (a) may be maintained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. . . .

The explicit language of this section -- any suit "for the recovery of any internal revenue tax alleged to have been erroneously or illegally collected" -- exactly describes Counts II, IV and VI of the complaint in this case.(18) Thus under this section plaintiffs' suit "may be maintained only against the United States," and only in conformity with the procedures outlined above.

Plaintiffs contend, however, that the statutory refund procedures apply only in cases where a taxpayer seeks a refund of taxes from the government. They contend that their dispute, on the contrary, is solely with the defendants, who they claim illegally collected taxes from them without authority because the separation of charges existed. They argue that section 7422(f) was enacted solely to ensure that all suits brought against the government name the United States as defendant rather than the district director of internal revenue, as formerly permitted,(19) and that its effect is not to "prohibit an action against a private party which wrongfully collects monies under the guise of taxes." Thus, they claim, the fact that the provisions of the Code are "exclusive" in suits against the government in no way affects plaintiffs' right to bring suit against these defendants, without reference to the statutory refund procedures.

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(18) See p. 4 supra.

(19) See S. Rep. No. 1625, 89th Cong., 2d Sess. (1966), reprinted in 1966 U.S. Code Cong. & Admin. News 3676, 3681-82; see generally Flora v. United States, 362 U.S. 145, 151-57 (1960); United States v. Kales, 314 U.S. 186, 197-200 (1941).

However, the language of section 7422 is unambiguous in requiring that a suit for the recovery of "erroneously or illegally" overpaid taxes may be brought only against the United States. Further, there is no indication that a remedy against private collecting agents such as defendants has ever been considered available. The legislative history of section 7422(f), while not directly on point, does not reveal that Congress contemplated that a tax refund suit might be brought against private collecting agents. To the contrary, the Senate report accompanying the bill referred only to the statutory procedures:

> The bill does away with tax refund suits against collection officers, but retains the provisions of present law which permit these suits to be brought directly against the United States . . . .
>
> . . . .

> Under present law a taxpayer seeking a refund of an overpayment of tax generally may sue the United States directly or may bring his action against the district director to whom the tax was paid. . . .
>
> . . . .
>
> Although this bill abolishes the right of action by a taxpayer against a Government employee serving as the tax collector, this is done only because other adequate remedies either are already available, or are being made available by this bill, for the recovery of illegal collections.(20)

Moreover, there is no case in which an action such as the one plaintiffs have brought has been allowed. Indeed, in the only similar cases suits by excise taxpayers against collecting agents such as defendants have been dismissed.(21)

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(20) S. Rep. No. 1625, 89th Cong., 2d Sess. (1966) reprinted in 1966 U.S. Code Cong. & Admin. News 3676, 3677, 3681.

(21) There are three previous cases, all in the Northern District of Illinois. Econ, Inc. v. Illinois Bell Telephone Co., 351 F. Supp. 1087 (N.D. Ill. 1972); Rose v. American Airlines, Inc., 331 F. Supp. 77 (N.D. Ill. 1971); Agron v. Illinois Bell Telephone Co., 325 F. Supp. 487 (N.D. Ill. 1970), aff'd in part and rev'd in part, 449 F.2d 906, 914 (7th Cir. 1971), cert. denied, 405 U.S. 954 (1972). While plaintiffs and defendants herein have debated at length the ground of decision in these cases, it is clear that in none of them was the suit allowed. State law cases have also indicated that a collecting agent is not liable to the taxpayer for an illegal collection when he has paid the taxes over to the government. See John L. Burns, Inc. v. Gulf Oil Corp., 268 F. Supp. 222, 223 (N.D. Ga. 1967); Kesbec, Inc. v. McGoldrick, 278 N.Y. 293, 297, 16 N.E.2d 288, 290 (1938). This accords with the common law rule that an agent acting for a disclosed

And it has long been held, without qualification, that "[t]he remedy so given [by the Code] is exclusive, and no other remedy can be substituted for it."(22) The exclusive nature of this remedy has consistently been protected by both Congress and the courts. For example, injunctions and declaratory judgments in tax cases are expressly forbidden by statute.(23) And the courts have repeatedly prevented any effort to circumvent, by whatever ingenious device, "the harmony of our carefully structured twentieth century system of tax litigation."(24) In short, what emerges from cases, statutes and

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footnote 21 cont'd

principal who receives money by mistake is not liable to the payor if he has paid the money over to his principal without notice of the payor's claim. See, e.g., Hooper v. Robinson, 98 U.S. 528, 540-41 (1878); Mountain Lumber Co. v. Davis, 11 F.2d 219, 221 (2d Cir.), cert. denied, 271 U.S. 674 (1926); Restatement (Second) of Agency, § 339, comment f (1958).

(22) Synder v. Marks, 109 U.S. 189, 193 (1883). See Cheatham v. United States, 92 U.S. 85, 88 (1875) ("That system is intended to be complete"); Kent v. Northern California Regional Office of Am. Friends Serv. Comm., 497 F.2d 1325, 1328 (9th Cir. 1974) ("the exclusive methods for litigating federal tax liability"); Poretto v. Usry, 295 F.2d 499, 501 (5th Cir. 1961), cert. denied, 369 U.S. 810 (1962) ("mandatory and exclusive").

(23) 26 U.S.C. § 7421, 28 U.S.C. § 2201. See also 28 U.S.C. § 2680(c) (Tort Claims Act).

(24) Flora v. United States, 362 U.S. 145, 176 (1960) (payment of entire tax required before refund suit maintainable). See also Lewis v. Sandler, 498 F.2d 395 (4th Cir. 1974)

legislative history alike is a purpose to channel all tax litigation into the structure provided by the Code. The total lack of mention of any remedy such as plaintiffs seek, combined with the oft-stated intent to make the statutory procedures exclusive, strongly suggests that section 7422(f) means precisely what it says, and that plaintiffs may maintain a tax refund claim only against the government and not against collecting agents.

Moreover, litigation directed against collecting agents might significantly impair the protections which the refund provisions of the Code were intended to afford the government. Many members of the class plaintiffs represent have not filed refund claims, and even those members of the class who have filed refund claims have not yet brought a

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footnote 24 cont'd

(civil rights action); Kent v. Northern California Regional Office of Am. Friends Serv. Comm., 497 F.2d 1325 (9th Cir. 1974) (interpleader by trustees directed to pay over tax to government if it is adjudicated constitutional); Bohn v. United States, 467 F.2d 1278 (8th Cir. 1972) (suit challenging allegedly illegal seizure of property); United States v. Freedman, 444 F.2d 1387 (9th Cir.), cert. denied, 404 U.S. 992 (1971) (motion for return of property under Rule 41(e), Fed. R. Crim. P.); Econ, Inc. v. Illinois Bell Telephone Co., 351 F. Supp. 1087 (N.D. Ill. 1972) (suit against collecting agent); England v. United States, 164 F. Supp. 322 (E.D. Ill), aff'd, 261 F.2d 455 (7th Cir. 1958) (tort suit based upon alleged fraud of government agents).

refund suit against the government. If the plaintiffs prevail, and the defendants in turn are allowed to recover from the government as they seek to do by their third-party complaint, the plaintiff taxpayers will have succeeded in avoiding the strict procedural requirements for obtaining refunds. In effect they will have obtained a refund of taxes from the government without giving the Internal Revenue Service an opportunity to consider their claims administratively, and without being subject to the statutes of limitations imposed by the Code.(25) This would clearly negate the Congressional purpose in enacting the refund provisions of the Code.

If the government is not made a party to a suit against a collecting agent, the problems are just as complex. In such a case the Court would be forced to adjudicate potentially complicated tax questions, perhaps of some public importance, in a litigation between private parties, without the benefit of the participation of the Internal Revenue Service. The government, of course, has a vital interest not only in collecting taxes that are due but also in assuring that refunds are made only to those entitled to them.(26) To permit private litigation for the recovery of tax refunds may defeat that purpose. In sum, the consequences of allowing plaintiffs to maintain this suit are a far cry from "the harmony of our carefully structured twentieth century system of tax litigation,"(27) and are persuasive evidence that Congress did not intend to permit a suit such as plaintiffs'.

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(25) The taxes at issue were collected during the years 1966-1972. The refund claims filed by plaintiffs were apparently filed in July, 1973, over seven years after the first contested taxes were collected. See p. 6 supra.

Plaintiffs press, however, that their suit is authorized by the Code itself, relying upon section 6415(c),(28) which provides:

> In case any person required . . . to collect any [transportation or communications excise] tax shall make an overcollection of such tax, such person shall, upon proper application, refund such overcollection to the person entitled thereto.

On its face this section does not create a cause of action for recovery of an overcollection by a taxpayer from a collecting agent. Plaintiffs argue, however, that this lawsuit itself is a "proper application" and that under section 6415(c) the defendants must refund to plaintiffs any amount overcollected. However, this section is applicable only to transportation and communications excise taxes, although there are other situations in which federal taxes are collected by third parties acting as collecting agents for the government.(29) Plaintiffs have suggested no reason why, despite the fact that the statutory tax refund procedures were generally intended to be exclusive, Congress should have singled out those who collect the transportation and communications excise taxes and impose liability for refunds of overcollections solely upon them, and not upon other collecting agents.

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(26) *Cf*. Cory Corp. v. Sauber, 284 F.2d 767, 773 (7th Cir. 1960), *cert. denied*, 366 U.S. 935 (1961).

(27) *See* n. 24 *supra*.

(28) 26 U.S.C. § 6415(c).

Moreover, while there is little in the legislative history to illuminate the purpose of section 6415(c), such as there is supports defendants' position that section 6415(c) does not authorize this suit. The purpose of section 6415 as a whole(30) is apparently to provide mechanisms for lessening

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(29) Perhaps the best-known such situation is the withholding of federal income and Federal Insurance Contributions Act taxes by a taxpayer's employer. See 26 U.S.C. §§ 3102, 3402.

(30) Section 6415 reads as follows:

> (a) Credit or refund of any overpayment of tax imposed by section 4251, 4261, or 4271 may be allowed to the person who collected the tax and paid it to the Secretary or his

burden of administering a tax which is imposed on a large number of taxpayers paying a relatively small amount of tax on each taxable transaction. It eliminates the necessity of individual taxpayers filing refund claims for each overpayment of an excise tax by allowing refunds to be made to the collecting agent for all of its customers, and it lessens the number

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footnote 30 cont'd

> delegate if such person establishes, under such regulations as the Secretary or his delegate may prescribe, that he has repaid the amount of such tax to the person from whom he collected it, or obtains the consent of such person to the allowance of such credit or refund.
> (b) Any person entitled to a refund of tax imposed by section 4251, 4261, or 4271 paid, or collected and paid, to the Secretary or his delegate by him may, instead of filing a claim for refund, take credit therefor against taxes imposed by such section due upon any subsequent return.
> (c) In case any person required under section 4251, 4261, or 4271 to collect any tax shall make an overcollection of such tax, such person shall, upon proper application, refund such overcollection to the person entitled thereto.
> (d) Any person making a refund of any payment on which tax imposed by section 4251, 4261, or 4271 has been collected may repay therewith the amount of tax collected on such payment.

Section 4251 imposes the communications excise tax; sections 4261 and 4271 impose excise taxes upon air transportation of persons and property, respectively.

of refund claims required by allowing a collecting agent in certain cases to take a credit upon a subsequent return instead of filing a refund claim. At the same time the statute ensures that the ultimate economic benefit of any refund or credit is passed on to the taxpayer.

Section 6415(c) is part of this mechanism. The predecessor of section 6415(c) indicated that a taxpayer could get a refund from a collecting agent "upon proper application" only in situations when the collecting agent was entitled to take a credit upon a subsequent return without filing for a refund. (31) Treasury regulations first promulgated in 1932, when the communications tax was enacted in its present form, and still applicable today, make it clear that a credit may be taken only when the overcollection was due to a "clerical or mechanical error." In all other cases, the regular refund procedure must be followed.(32) While the precise form of section 6415(c) differs from its predecessor statute, the legislative history of the Code indicates that no substantive change in the law was intended thereby.(33) Thus, it appears that section 6415(c) is intended merely to simplify the procedures for adjustment of minor errors in tax collection, and not to carve out sub silentio an exception to the orderly structure of tax litigation by allowing persons seeking to litigate major and disputed questions of tax law to bypass the normal refund procedure.(34)

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(31) *See* Internal Revenue Code of 1939, § 1715(d)(2), (made applicable to the communications tax by Internal Revenue Code of 1939, § 3473):

> In the case of any overpayment or overcollection of any tax imposed by this chapter, the person making such overpayment or overcollection may take credit therefor against taxes due upon any return, and shall make refund of any excessive amount collected by him upon proper application by the person entitled thereto.

See also Revenue Act of 1932, 47 Stat. 169, § 774; Revenue Act of 1926, 44 Stat. 9, § 1120; Revenue Act of 1918, 40 Stat. 1057, § 1310(a).

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(32) Treas. Reg. 42, Art. 51, 52 (1932); Treas. Reg. 42, §§130.77, 130.78 (1942). As applicable today the regulations read:

> Every person required to pay tax, or to collect and pay tax, who overpays from his own funds, tax on any monthly return may, in cases where the overpayment was the result of a clerical or mechanical error, take credit for such overpayment against the tax due on a subsequent monthly return.
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> . . . .
>
> A claim for abatement or refund of taxes alleged to have been erroneously or illegally assessed or paid . . . shall be prepared on Form 843 and presented to the collector of internal revenue for the district in which the amount claimed was assessed or paid. (See section [6511] of the Code.)

Although these regulations were promulgated under the 1939 Code they remain in effect today. 26 C.F.R. § 301.6415-1 (1976); Id. § 49.0-4; Treas. Dec. 6091, 1954-2 Cum. Bull. 47, § 1; see Rev. Rul. 70-13, 1970-1 Cum. Bull. 273.

(33) H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954); S. Rep. No. 1662, 83d Cong., 2d Sess (1954), both reprinted in 1954 U.S. Code Cong. & Admin. News 4560, 5231.

Thus, the overall structure of the refund provisions of the Code negates plaintiffs' efforts to seek a tax refund from defendants. However, while conceding that the arguments against allowing this suit would have "considerable force" in an "ordinary" overcollection suit,(35) plaintiffs contend that their case is extraordinary because the taxes were allegedly collected by defendants without probable cause to do so. Plaintiffs further contend that preventing a taxpayer from maintaining suit against a collecting agent would be unfair to the taxpayer, since the collecting agent could conceal from the taxpayer facts entitling him to a refund until after the lapse of the period for filing a refund claim, thus barring altogether any recovery. However, as noted above, Counts II, IV and VI of the complaint are pleaded merely as claims for refund of overcollected taxes. They contain no allegation of lack of probable cause to collect the taxes, nor of any concealment of facts from the plaintiffs. Thus, the short answer to plaintiffs' argument is that, whatever its merits, it is not relevant to the claim upon which plaintiffs seek recovery from the defendants.(36)

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(34) This was made explicit in an early version of the regulations under a predecessor of § 6415(c), section 1310(a) of the Internal Revenue Act of 1918, 40 Stat. 1057, as it applied to the dues and admissions excise taxes, for which the collection and refund procedures were essentially identical to the communications tax. These regulations read in part as follows:

> It should be noted that the right to claim a credit exists only in the case of "overpayment or overcollection." These words are confined in general to cases where, as the result of some clerical or mechanical error, an excess amount has been collected or paid.
> . . . In all cases where tax has been collected and such collections are alleged to be *illegal* *or erroneous* it will be necessary for the person so paying the tax to file claim for refund . . . . Section 1310(a) of the Act [the predecessor of §6415(c)] does not authorize the individuals, corporations, partnerships, or associations receiving such tax to make refund nor to adjust the claim. The only adjustment authorized under this section of the Act being limited to cases of *overpayment* *or* *overcollection* of tax.

Treas. Reg. 43, Art. 65, 66 (1921) (emphasis original).

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(35) Transcript of argument, January 25, 1977, at 29-30.

(36) In addition, plaintiffs' basic legal analysis is based primarily on the language and history of various sections of the Code, principally sections 7422(f) and 6415(c). It does not depend on the presence or absence of probable cause or concealment, but rather on defendants' status as collecting agents. In fact, the only authority cited by plaintiffs

Moreover, the interference with the orderly administration of the revenue laws is great even under plaintiffs' theory. It must be remembered that the defendants did not choose the role of collecting agents. The duty to collect the tax was imposed upon defendants by statute -- enforceable, if necessary, by criminal liability (37) -- for the convenience of the United States. Because the communications tax is imposed upon literally millions of separate transactions each year, its efficient administration requires that the defendants collect the tax as they do. In so collecting the tax and paying it over to the government the defendants act merely as agents for the United States. (38)

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footnote 36 cont'd

in support of the distinction between a case where taxes were collected without probable cause and a case where probable cause exists, 28 U.S.C. § 2006, is patently irrelevant. See n. 46 infra. Thus, adopting plaintiffs' reasoning in this suit would permit a wide range of lawsuits to be brought against collecting agents whether or not probable cause or concealment existed, contrary to the exclusive refund provisions of the Code.

(37) 26 U.S.C. §§ 6672, 7202.

(38) Cf. United States v. Washington Toll Bridge Auth., 307 F.2d 330, 334-35 (9th Cir. 1962), cert. denied, 372 U.S. 911 (1963); Sharp & Dohme, Inc. v. United States, 144 F.2d 456, 458 (3d Cir. 1944).

If plaintiffs' theory were accepted, however, the defendants would be placed in the position of having to collect taxes at their peril. Allowing suits such as plaintiffs' might lead to situations in which the collecting agent would be required to refund taxes to the taxpayer but could not recover them from the government. This is so because the procedures which must be followed in tax refund suits, outlined above, constitute a limited waiver of sovereign immunity and must therefore be fulfilled before any suit can be brought against the United States.(39) For example, if the taxpayer is permitted to sue the collecting agent after the statute of limitations for filing refund claims with the government has expired, the collecting agent may not be able to obtain a refund from the government of the amount it is required to pay the taxpayer, since, not being on notice of the taxpayer's claim within the limitations period, it would not have made a timely refund claim. It is unlikely that Congress, in requiring the defendants to collect taxes on behalf of the government, intended that they would have to defend lawsuits on behalf of the government or even bear themselves the burden of a tax imposed upon their customers.

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(39) See, e.g., United States v. Michel, 282 U.S. 656, 658 (1931); Kings County Savings Institution v. Blair, 116 U.S. 200, 205-06 (1886); United States v. Rochelle, 363 F.2d 225, 230-31 (5th Cir. 1966) (Waterman, J.).

The Court does not hold that an action can never be maintained against a telephone company for alleged wrongs arising out of the performance of its duties as collecting agent for federal taxes. In fact, the defendants, while denying plaintiffs' charges of wrongful conduct, have not challenged plaintiffs' right to maintain this suit upon the other counts of their complaint. Where, however, the gravamen of the complaint is merely that a tax was collected which was not owed, and where the money was duly paid to the government by the collecting agent, allowing the taxpayer to sue the collecting agent when he collected the tax "erroneously or illegally" would unduly interfere with the orderly administration of the internal revenue laws. In such a case the taxpayer should be required to avail himself of his statutory remedies against the government, which is the real party in interest. As the Court of Appeals for the Ninth Circuit said in another case involving the telephone excise tax:

> [A]llowing [this suit] . . . could disrupt the orderly procedures created by Congress for handling tax litigation. The administration of the fiscal needs of the United States is undoubtedly a monumental task and is of vital importance to the nation. Congress has provided a system in which

> judicial review of tax liability can be obtained. In Flora v. United States, 362 U.S. 145 (1960), the Supreme Court recognized that the procedures for obtaining judicial review of tax liability were designed to be the exclusive methods for litigating federal tax liability. In the instant case the taxpayers could have contested their tax liability . . . in a refund suit . . . . The procedure devised by the present taxpayers is outside the exclusive scheme provided by Congress.(40)

Accordingly, the defendants' motion for summary judgment on Counts II, IV and VI of the complaint is granted.

II. THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

With the dismissal of Counts II, IV and VI of the complaint, the remaining counts of the complaint are all grounded upon the allegedly tortious conduct of defendants. The defendants' third-party complaint against the government alleges that defendants acted "as agents and fiduciaries for the United States of America in collecting [the telephone excise] taxes and paying them over to the United States of America" and that the United States therefore "is liable to defendants" for any amount defendants may be required to pay to plaintiffs on Counts I through VI.(41) Whether the third-party complaint is read to allege a claim for refund of taxes under section 6415(a) of the Code (42) or a claim against the government sounding in tort, it must be dismissed for lack of jurisdiction since the government has not waived its sovereign immunity from suit as to the subject matter of the remaining counts of the complaint. (43)

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(40) Kent v. Northern California Regional Office of Am. Friends Serv. Comm., 497 F.2d 1325, 1328 (9th Cir. 1974).

(41) Third-Party Complaint, ¶¶ 4, 5. No liability over is asserted on Counts VII and VIII, the antitrust counts.

In Counts I, III and V of the complaint, the remaining counts to which the third-party complaint is applicable, plaintiffs do not seek a refund of overcollected taxes. Their claim is not that defendants collected more taxes than were properly due, but rather than defendants' allegedly tortious acts increased plaintiffs' tax liability. Under plaintiffs' theory on these counts the United States was legally entitled to all the revenues it received. Should defendants be held liable to plaintiffs under these counts, the recoverable damages would be based upon defendants' breach of duty owed to plaintiffs, and the damages could include items in addition to taxes which plaintiffs paid because of defendants' alleged failure to make a "separate charge." Since any liability of defendants on these counts would thus not be in the nature of a repayment of taxes, they could have no claim against the government "for the recovery of any internal-revenue tax," and there is thus no jurisdiction under Title 28, United States Code, section 1346(a)(1).

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(42) See n. 30 supra.

(43) Indeed, defendants virtually conceded as much at argument of this motion. Transcript of argument, January 29, 1977, at 22-23.

Nor is there subject matter jurisdiction of the third-party claim if it is intended to assert a claim against the United States as a joint tortfeasor. Specifically excluded from the operation of the Federal Torts Claims Act is "[a]ny claim arising in respect of the assessment or collection of any tax."(44) Any claim by defendants against the United States in this case "aris[es] in respect of" the performance of their function as collecting agents. There is thus no jurisdiction over such a claim.(45) Nor is there jurisdiction under Title 28, United States Code, section 2006, which applies only to a "revenue officer" and not to a collecting agent such as defendants.(46) Since there is no jurisdictional basis for the third-party claim insofar as it relates to the remaining counts of the complaint to which it is applicable, the motion of the United States for summary judgment dismissing the third-party complaint is granted.

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(44) 28 U.S.C. § 2680(c).

(45) Morris v. United States, 521 F.2d 872, 874 (9th Cir. 1975); Broadway Open Air Theatre v. United States, 208 F.2d 257 (4th Cir. 1953); Paige v. Dillon, 217 F. Supp. 18, 20 (S.D. N.Y. 1963). Although jurisdiction is usually found to exist over third-party claims on principles of ancillary jurisdiction, *see* 6 C.Wright & A. Miller, Federal Practice & Procedure, Civil § 1444 (1971), this is not true where, as here, a waiver of sovereign immunity is at issue. *Id.* § 1450 at 275-76; *see generally* United States v. Yellow Cab Co., 340 U.S. 543 (1951).

It is so ordered.

Dated: New York, N. Y.
March 23, 1977

EDWARD WEINFELD
United States District Judge

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(46) It is clear that the term "collector" in 28 U.S.C. § 2006 does not refer to any person who collects a tax, but rather to the statutory position of collector of internal revenue, later known as the district director of internal revenue. *See* Internal Revenue Code of 1939, § 3940 et seq. *See also* Agnew v. Haymes, 141 F. 631, 640 (4th Cir. 1905) ("The protection afforded by [§ 2006] is confined to officers of the revenue"); *cf.* John J. Casale, Inc. v. Pedrick, 72 F. Supp. 848, 850 (S.D.N.Y. 1947) ("Any person required to pay *the collector* a tax . . . is a taxpayer and this is so though he must first collect such tax from another taxpayer") (emphasis supplied); S. Rep. No. 1625, 89th Cong., 2d Sess. (1966) *quoted* pp. 9-10 *supra*.

OPINION DATED SEPTEMBER 29, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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DUPONT GLORE FORGAN INCORPORATED, THE HOME INSURANCE COMPANY, MONSANTO COMPANY, REYNOLDS SECURITIES, INC., SCHENLEY INDUSTRIES, INC., and SWIFT & COMPANY, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

-against-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, CINCINNATI BELL, INC., DIAMOND STATE TELEPHONE COMPANY, ILLINOIS BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY, MICHIGAN BELL TELEPHONE COMPANY, THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, NEW JERSEY BELL TELEPHONE COMPANY, NEW YORK TELEPHONE COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, THE OHIO BELL TELEPHONE COMPANY, PACIFIC NORTHWEST BELL TELEPHONE COMPANY, PACIFIC TELEPHONE AND TELEGRAPH COMPANY, SOUTH CENTRAL BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, SOUTHERN NEW ENGLAND TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, and WISCONSIN TELEPHONE COMPANY,

Defendants
and Third-Party Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Third-Party Defendant.

- x

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OPINION

#43139

Opinion dated September 29, 1975

EDWARD WEINFELD, D. J.

This action originally was instituted by six named plaintiffs,(1) who also sought class action certification on behalf of all other Centrex users similarly situated, against the American Telephone and Telegraph Company ("AT&T") and its twenty-three operating telephone company subsidiaries,(2) constituting and known as the Bell System. Centrex Service is a form of telephone service used by large business and other organizations. This type of "private communication service" was exempted from federal communication excise taxes by the Excise Tax Reduction Act of 1965, effective January 1, 1966, upon condition that a separate charge was made for such service.(3) Plaintiffs allege that because of defendants' failure to make Centrex charge separations, they were charged by and paid to various defendants excessive federal communications excise taxes which they seek to recover upon a claim of breach of fiduciary duty, and other theories. The plaintiffs also assert that defendants' continued collection of federal excise taxes on the Centrex system was the result of a combination, conspiracy or concerted action among the defendants, in violation of sections 1 and 2 of the Sherman Act.(4)

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(1) duPont Glore Forgan, Inc., Swift & Company, The Home Insurance Company, Monsanto Company, Reynolds Securities, Inc. and Schenley Industries, Inc.

(2) AT&T owns from 18% to 100% of the capital stock of the defendant operating companies. Sixteen of these companies are wholly owned by AT&T. Of the remaining seven, AT&T's interest in five of the defendants is at least 85% and it owns 27% and 18% of the remaining two. In addition, AT&T has license agreements with each of the defendant operating telephone companies.

(3) 26 U.S.C. § 4252(d).

All plaintiffs were represented by the same attorneys. Upon plaintiffs' motion for class action treatment, the defendants opposed, raising among other objections that the plaintiffs' claims had been solicited by the attorneys. Since the court found that "[t]his aspect of defendants' challenge to plaintiffs as adequate representatives of the proposed class bristles with disputed fact issues as to the circumstances under which the attorneys were retained," the matter was referred to a magistrate to hear and report on the solicitation issue. During the course of the reference, three of the named plaintiffs moved for voluntary dismissal of their claims, which motions were granted.(5) The action was continued as to three of the original plaintiffs, Monsanto Company, Reynolds Securities, Inc. and Schenley Industries, Inc.

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(4) 15 U.S.C. §§ 1, 2.

The hearings before the magistrate extended over a considerable period with hundreds of pages of testimony recorded. Before completion of the reference, plaintiffs' attorneys, who at all times denied the charge of solicitation, moved to withdraw and for leave to plaintiffs to substitute other attorneys. They stated that the collateral inquiry on the solicitation issue had resulted in inordinate delay and were of the view that their withdrawal would permit the case to go forward for a determination upon the merits. The magistrate held that the withdrawal of the attorneys and substitution of new counsel for plaintiffs would moot the issue of solicitation and obviate the need for further hearings thereon. The defendants contended otherwise, upon the ground that the three remaining plaintiffs themselves were disqualified and sought to continue the inquiry into that subject. Upon defendants' motion to review the magistrate's determination on the solicitation issue, the court granted the motion for substitution of plaintiffs' attorneys upon a finding that new counsel were well qualified to represent the plaintiffs in this class action litigation.

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(5) duPont Glore Forgan, Inc., Swift & Company and The Home Insurance Company.

We consider the plaintiffs' original motion to maintain this action as a class suit pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure which defendants continued to oppose on various grounds. Preliminarily, defendants contend that the three remaining plaintiffs are disqualified or "tainted" because they allowed themselves to be solicited by their former attorneys for the purpose of instituting this class action litigation and in consequence they will not be able to fairly and adequately represent and protect the interests of the class. (6)

The charge of solicitation, as already noted, was denied by the former attorneys, but the issue was not resolved in view of their withdrawal. Assuming arguendo that plaintiffs were solicited, there has been no showing of improper conduct on their part or that they knowingly acted in concert with their former attorneys in violating the canons of ethics. The original claims of the plaintiffs continue to exist. They are not destroyed by the alleged conduct of the attorneys; nor does this circumstance by itself impair or taint plaintiffs' capacity to represent the class, if otherwise they are found to be adequate representatives of the class they seek to represent.

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(6) Defendants rely on Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237, 240 (N.D. Tex. 1972), and Simon v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 16 Fed. Rules Serv.2d 1021, 1022 (N.D. Tex. 1972), aff'd, 482 F.2d 880, 882-83 (5th Cir. 1972), to support their argument that such solicitation automatically compels denial of class action treatment. However, in both cases, the court's decision against class action was primarily grounded on plaintiff's clear failure to meet the express requirements of Rule 23. Also, the attorneys responsible for the solicitation misconduct had remained in the case.

Upon the withdrawal of their former counsel, the three remaining plaintiffs independently engaged their present counsel to advance their claims. These plaintiffs to date have shown a resolute purpose to obtain a determination upon the merits. They have not been deterred by the extensive, if not extraordinary, pretrial discovery conducted by defendants upon the single item of solication, with the inevitable inconvenience and disruption of their normal business activities and are now ready to face the prospect of renewed discovery as to other issues in the case. They have already advanced substantial sums for disbursements and are prepared to incur liability for additional disbursements to bring the case to trial.

The former attorneys have waived fees for services rendered by them to date; they are to receive no fees in this matter; they have no interest in the outcome of this case. Their withdrawal has, as the Court of Appeals observed in a somewhat related situation, "drastically" altered the nature of the case; the original issue of disqualification of attorneys, which so far has stymied trial progress is "entirely out of the case."(7) Under all the circumstances, it appears that the remaining plaintiffs are adequate representatives of the class and are not disqualified to advance their cause.

Before considering whether this action meets the other requirements for class action status under Rule 23, it is desirable first to pass upon the defendants' challenge to plaintiffs' standing to sue on behalf of Centrex customers who dealt with operating companies other than those which serviced plaintiffs. Plaintiffs received Centrex service from only two of the defendant operating companies. Defendants contend that plaintiffs may not represent those who obtained service from the twenty-one other operating companies who are defendants.(8) However, defendants' objection disregards the pleadings and the claims which plaintiffs assert.

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(7) Korn v. Franchard Corp., 456 F.2d 1206, 1208 (2d Cir. 1972).

In all, eight separate counts are alleged. The odd numbered counts, I, III and V, are based upon the same theory that the defendants' failure to separate Centrex charges constituted a breach of duty under federal statutes and principles of equity and common law and was the proximate cause of the alleged tax overpayments. The even numbered counts, II, IV and VI, are based upon the same allegations as those set forth in the odd numbered counts, with the additional claim that the charges for Centrex services were sufficiently segregated in defendants' books and records to satisfy the requirements for an exemption under the Excise Tax Reduction Act of 1965.(9) Therefore, plaintiffs contend that defendants', apart from alleged liability to the plaintiff class for damages, were under an obligation to refund this overcollection of taxes.

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(8) Defendants rely on O'Shea v. Littleton, 414 U.S. 488, 494 (1974), in which the Supreme Court held that "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." This decision followed a long line of cases in the lower courts which had established that a "plaintiff who is unable to secure standing for himself is certainly not in a position to 'fairly insure the adequate representation' of those alleged to be similarly situated." Kauffman v. The Dreyfus Fund, Inc., 434 F.2d 727, 734 (3d Cir. 1970), cert. denied, 401 U.S. 974 (1971). See also Leonard v. Merrill Lynch, Pierce, Fenner and Smith, 64 F.R.D. 432, 434 (S.D.N.Y. 1974); Weiner v. Bank of King of Prussia, 358 F. Supp. 684, 695 (E.D. Pa. 1973).

The eight causes of action have been grouped together as follows: Counts I and II are brought solely against AT&T on behalf of all Centrex users between January 1, 1966 and December 31, 1972; it is estimated that the class is slightly in excess of 1000 members. Counts III and IV are brought against AT&T and New York Telephone Company on behalf of all Centrex customers of New York Telephone Company between January 1, 1966 and August 1, 1972, when New York Telephone made the requisite separations. This class, already included in the nationwide class, is estimated to number 378 members. Counts V and VI are brought against AT&T and all other defendants (the twenty-three associated Bell System operating telephone companies) which are subsidiaries and licensees of AT&T, upon a claim that by failing to make the requisite separation of charges wrongfully collected excessive excise taxes from the nationwide class described in counts I and II. Counts VII and VIII are the antitrust counts and are brought on behalf of the same nationwide class described in counts I, II, V and VI. These antitrust counts in effect encompass all other counts based upon additional allegations that the breach of statutory and common law obligations owing to plaintiffs alleged therein also constituted violation of sections 1 and 2 of the Sherman Act. In sum, under the eight counts, two classes are described, one the nationwide Centrex customers, and two (already included in the former) the customers of New York Telephone Company. As to the latter there can be no serious dispute that plaintiffs, as customers of New York Telephone, have standing to assert the claims against it on behalf of the estimated other 378 New York Telephone customers under counts III and IV. Plaintiffs have also named AT&T as defendant under these and all other counts of the complaint.

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(9) 26 U.S.C. § 4252(d).

Plaintiffs contend that AT&T, as parent company and licensor of defendant operating companies, including

New York Telephone Company, directed these companies' management policies, and in particular played a significant role in their separation of charges policy. In essence, however phrased, the claim is that AT&T dominated, aided and abetted the defendant operating companies, including New York Telephone Company, in breaching their statutory and fiduciary duties allegedly owed to plaintiffs. This claim is sufficient to sustain plaintiffs' standing to represent the class of New York Telephone customers against AT&T under counts III and IV.(10)

The defendants press, however, that plaintiffs have no standing to sue on behalf of those Centrex customers who dealt with operating companies other than the New York Telephone Company and who are included in the nationwide class described in the other counts of the complaint. But plaintiffs in effect allege a conspiracy among AT&T and the various other defendants to deprive plaintiffs and all Centrex users, similarly situated, and no matter by which operating company they were serviced, of their right to a tax exemption by their deliberate and calculated policy not to implement separation of charges within a reasonable time after the passage of the federal Excise Tax Reduction Act.

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(10) *Cf*. Jackson v. Smith, 254 U.S. 586, 589 (1921); Bankers Life & Cas. Co. v. Kirtley, 338 F.2d 1006, 1013 (8th Cir. 1964); Sexton v. Sword S.S. Line, Inc., 118 F.2d 708, 711 (2d Cir. 1941); Irving Trust Co. v. Deutsch, 73 F.2d 121, 125 (2d Cir. 1934), *cert. denied*, 294 U.S. 708-709 (1935); Oil & Gas Ventures-First 1958 Fund, Ltd. v. Kung, 250 F. Supp. 744 (S.D.N.Y. 1966); Industrial Waxes, Inc. v. International Ry., 193 F. Supp. 783, 786 (S.D.N.Y. 1961); Austrian v. Williams, 103 F. Supp. 64, 76 (S.D.N.Y.), *rev'd on other grounds*, 198 F.2d 697 (2d Cir.), *cert. denied*, 344 U.S. 909 (1952); Broadcast Music, Inc. v. Taylor, 10 Misc.2d 9, 55 N.Y.S.2d 94, 103 (Sup. Ct. 1945); Wendt v. Fischer, 243 N.Y. 439, 154 N.E. 303 (1926).

This court is not required to and, of course, does not at this time pass upon the merits of plaintiffs' antitrust cause of action or any of their other claims, (11) all of which defendants vigorously dispute. However, based upon the pleadings as supported by evidence discovered during preliminary pretrial procedures, a finding is warranted that plaintiffs' claim of conspiracy appears to have merit and to present a genuine issue for litigation. The acts and conduct attributed to the defendants had the same impact upon all Centrex users; all allegedly were injured thereby except for differences in amounts of overpayment of taxes. In the circumstances, plaintiffs have standing to represent the class as against all the defendants.(12)

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(11) Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974).

Further, since the respective claims derive from the same federal tax statute which is uniformly applicable to all Centrex users and the alleged fiduciary duty also presents an issue which does not vary from one customer to another, the court finds that questions of law affecting plaintiffs, as Centrex customers, predominate over any question of law affecting an individual customer. Similarly, the same basic questions of law exist regardless of the particular defendant from whom plaintiffs seek recovery of the excise taxes. The defendants' contention that the named plaintiffs lack standing to assert state law claims on behalf of Centrex customers in any of the forty-five states in which the named plaintiffs do not have Centrex service, does not take into account the plaintiffs' allegations under their complaint, which essentially predicate all claims upon a tax exemption permitted under the federal statute. The fact that Centrex is, as defendants contend, a local telephone exchange service, subject to the jurisdiction of state and local regulatory authorities, does not diminish the right of Centrex customers to the claimed exemption and no state regulatory body may override the federal statute which permits the exemption. Further, even if plaintiffs assert alternative pendent claims under state law, this does not foreclose class action certification where other requirements of the Rule are met with respect to the claims based upon federal law. (13)

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(12) Professional Adjusting Systems of America, Inc. v. General Adjustment Bureau, Inc., 64 F.R.D. 35, 38-39 (1974)

Finally, common questions of fact predominate over individual ones, especially since plaintiffs charge concert of action among the defendants. The fact that different damages may have resulted to each member does not detract from the class action nature of this suit. (14) Thus, the requirement of Rule 23(b)(3) that the common questions of law and fact predominate over any questions affecting only individual members is satisfied.

The Rule further requires that the class action be found "superior to other available methods for the fair and efficient adjudication of the controversy." The parties in support of and in opposition to the motion for class action determination have submitted memoranda totalling more than 500 pages. Whether or not such an outpouring of legal learning was in fact necessary on a motion of this type, it does demonstrate that the parties themselves consider plaintiffs' claims to present issues that are complex and involved; also, it shows that the defendant AT&T, a corporate giant with vast resources, intends to resist the claims advanced, as indeed is not only its right but its duty to its stockholders. The experience to date with pretrial discovery on the single issue of the alleged solicitation by plaintiffs' former attorneys warrants the observation that this action, instead of following the course of normal litigation, appears to have embroiled the parties in a war of attrition.

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(13) Cf. Haas v. Pittsburgh Nat'l Bank, 60 F.R.D. 604, 606-07 (W.D. Pa. 1973).

(14) Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 566 (2d Cir. 1969); Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 45 (S.D.N.Y. 1966).

This observation is pertinent to the response by newly retained counsel for plaintiffs to the court's inquiry why Monsanto, itself no corporate pigmy, would not, without class action determination, prosecute its claim, which amounts to $130,000. Counsel's reply was that, while Monsanto was willing to continue to pay disbursements which, to date, have been substantial, the time-cost factor of legal fees in view of the vigor of defendants' opposition, made it uneconomical to proceed with the suit on an individual basis even assuming an ultimate recovery -- in fact, Monsanto would, if required to proceed on an individual basis, forego its claim. Recent experience with legal charges and their computation suggests that counsel's statement was not exaggerated.(15) Thus, the assertion that this action will not go forward at all if class action status is denied is plausible. The hard fact is that economic reality indicates the likelihood that unless this action is permitted to proceed as a class suit, it is the end of this litigation.

Such a prospect requires consideration of the claims of others in the class. It is estimated, as previously noted, that there are approximately 1000 nationwide Centrex users in plaintiffs' class. Many of these claims are for substantially lesser amounts than those asserted by the three named plaintiffs. It has been stated that a significant number are considerably below $10,000 each. For those potential plaintiffs, denial of class action would be tantamount to a denial of their day in court, since any attempt to litigate their individual claims would mean taking on a powerful opponent ready to bring into play its full strength and unlimited resources to resist the suits. The sheer disparity of economic forces suggests the death knell of those claims if individual actions are required. Thus, even if the named plaintiffs were to accept the risks and burdens of this action as individuals, the denial of class action would as a realistic matter put at rest the much smaller claims of other similarly situated Centrex users.(16) As this court indicated in Free World

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(15) Blank v. Talley Industries, Inc., 390 F. Supp. 1, 4 (S.D.N.Y. 1975).

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(16) In addition to the instant action, four other individual suits have been brought on similar grounds against the Bell System. In this district, Exxon Corporation filed an action against AT&T and three operating companies, New York Telephone Company, Southwestern Bell and South Central Bell Telephone Company. Exxon Corp. v. AT&T, et al., S.D.N.Y., 74 Civ. 1488 (April 1, 1974). In the District of Connecticut two actions were commenced, one by United Aircraft Corporation against AT&T and Southern New England Telephone Company, United Aircraft Corp. v. AT&T, et al., D. Conn., Civil Action No. H-296 (1973), and one by Hartford National Bank against AT&T and Southern New England Telephone Company, Hartford National Bank v. AT&T, et al., D. Conn., Civil Action No. H-270 (1973). The fourth action was instituted in the Connecticut Superior Court by Travelers Insurance Co. against Southern New England Telephone Company, The Travelers Ins. Co. v. The Southern New England Telephone Co., Conn. Super. Ct., Hartford County, No. 18229 (May 18, 1973). The damages alleged in Exxon are approximately $500,000. The amounts involved in the Hartford National Bank, Travelers and United Aircraft cases are approximately $49,000, $162,000 and $232,000, respectively. Thus, the fact that these claims are pending does not resolve the problem of the smaller claims.

Foreign Cars, Inc. v. Alfa Romeo,(17) the essential purpose of Rule 23 is "to encourage suits to redress rights where claims would otherwise be too small to warrant individual litigation." It is recognized that the smaller individual claims, those under $10,000, are much larger than the claims which generally have been the subject of the "death knell" theory. But general terms are relative; they are not absolutes. The death knell may also sound upon a claim, which upon the surface in dollar amount is substantial, when the heavy costs of litigation dictate its abandonment as a matter of economic reality, even though it may have merit.

Thus, in State of Minnesota v. United States Steel Corporation, the court realized "[w]hile claims held by steel purchasers would undoubtedly normally be larger than those brought in the Eisen case, nevertheless, it is extremely difficult to bring an antitrust action against six major steel fabricators without the financial aid made possible by the class action device."(18) The court there further observed that "[f]ew are the individual claimants with a sufficient interest at stake or resources to bring a suit requiring proof of a conspiracy among business corporations." (19) One of the factors which the court particularly emphasized was that "[d]iscovery expense alone normally would be prohibitive" (20) in such a suit. Certainly this has been amply demonstrated in the instant action, where with the case hardly off the ground discovery to date has produced over 9000 pages of documents. If this is a forecast of events to come, it borders on the absurd to expect that the smaller claimants would commence individual suits.

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(17) 55 F.R.D. 26, 30 (S.D.N.Y. 1972).

(18) 44 F.R.D. 559, 572 (D. Minn. 1968).

But of greater significance than the numerosity of claims, the smallness of many of them and the disparity in economic forces, is that the case, whether maintained individually or as a class action, is fraught with difficult questions of law and fact, which makes the class action a superior method of resolving the issues. The mere statement of plaintiffs' claims, the concepts relied upon to support them, and the nature of the various defenses leaves no doubt that the case presents novel issues which are, in defendants' own words, both "variegated and complex."(21) Superiority under Rule 23(b)(3), while primarily concerned with the economic feasibility of individual actions by small claimants,(22) is not limited to this consideration. Rather, as the Advisory Committee on Civil Rules indicated at the time of revision of Rule 23:(23)

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(19) *Id.*

(20) *Id.*

> "Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."

These factors of judicial efficiency, economy and uniformity are prevalent in the instant case, which involved over 1000 potential individual claims, and questions of the interpretation to be given a federal tax statute.

Finally, this court finds the class action to be

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(21) Memorandum of Law in Opposition to Plaintiffs' Motion for Class Action Treatment, p. 18 n.*.

(22) Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968).

(23) Advisory Committee Report, Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102-03 (1966).

"manageable" under section (b)(3) of Rule 23. Certainly any difficulties in handling this suit as a class action are far surpassed by the difficulties, in terms of judicial economy of administration, which would be involved in litigating these claims as individual actions.

For all of the above reasons, the court is satisfied that a class action is "superior" under the Rule, and further that all of the other prerequisites to class action treatment have been met.(24) Accordingly, the motion for class action determination is granted.

Dated: New York, N. Y.
September 29, 1975

United States District Judge

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(24) The court rejects defendants' contention that the claim for overcollection of federal excise taxes stated in counts II, IV and VI of the complaint is not amenable to class action certification. In this instance, once again, the pleadings control. The suit here is not against the government; it is against private corporations which allegedly violated the rights of the plaintiff by making an overcollection of their federal communication excise taxes. Whether a cause of action for such overcollection may be brought against a private party is, of course, not an issue presently before the court.

NOTICE OF APPEAL OF PLAINTIFFS-APPELLANTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

- against -

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

- against -

UNITED STATES OF AMERICA,

Third-Party Defendant.

---X

73 Civ. 2447
(EW)

Notice of Appeal

Notice is hereby given that plaintiffs hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this class action on the 5th day of August, 1977, dismissing the complaint in its entirety on the merits.

Dated: New York, New York
September 1, 1977

Nickerson, Kramer, Lowenstein,
Nessen, Kamin & Soll

By ____________________
A Member of the Firm
Attorneys for Plaintiffs
919 Third Avenue
New York, New York 10022
(212) 688-1100

NOTICE OF APPEAL OF DEFENDANTS AND THIRD-PARTY PLAINTIFFS-APPELLEES-APPELLANTS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

-against-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Third-Party Defendant.

- x

73 Civ. 2447 (EW)

NOTICE OF APPEAL

Notice is hereby given that defendants and third-party plaintiffs American Telephone and Telegraph Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, Cincinnati Bell, Inc., The Diamond State Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, The Mountain States Telephone and Telegraph Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, Northwestern Bell Telephone Company, The Ohio Bell Telephone Company, Pacific Northwest Bell Telephone Company, The Pacific Telephone and Telegraph Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southern New England Telephone Company, Southwestern

Bell Telephone Company, and Wisconsin Telephone Company hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on August 5, 1977.

Dated: New York, New York
September 15, 1977

DAVIS POLK & WARDWELL

By Guy Miller Struve
A Member of the Firm

1 Chase Manhattan Plaza
New York, New York 10005
HA 2-3400

Attorneys for Defendants and
Third-Party Plaintiffs

TO:

NICKERSON, KRAMER, LOWENSTEIN,
NESSEN, KAMIN & SOLL
919 Third Avenue
New York, New York 10022

Attorneys for Plaintiffs

GILBERT, SEGALL AND YOUNG
430 Park Avenue
New York, New York 10022

Attorneys for Delta Airlines, Inc.

WILLIAM M. TENDY, ESQ.
Acting United States Attorney
1 St. Andrew's Plaza
New York, New York 10007

Attorney for Third-Party
Defendant

ORDER ON CONSENT FILED DECEMBER 10, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed 12/10/75

- - - - - - - - - - - - - - - - - - - -X

DUPONT GLORE FORGAN :
INCORPORATED, et al., :

Plaintiffs, :

- against - :

AMERICAN TELEPHONE AND : 73 Civ. 2447 (EW)
TELEGRAPH COMPANY, et al., :

Defendants and Third- : Order on consent
Party Plaintiffs, :

- against - :

UNITED STATES OF AMERICA, :

Third-Party Defendant. :

- - - - - - - - - - - - - - - - - - - -X

The Court having filed an opinion dated September 29, 1975 holding that this action may be maintained as a class action on behalf of subscribers to Centrex telephone service who were taxable Centrex customers of any one or more of the defendants, other than defendant American Telephone and Telegraph Company (hereafter the "defendant operating companies"), at any time during the period between January 1, 1960 and the effective date of the establishment of separate Centrex station charges for exchange access and for intercommunication (hereafter the "relevant period").

Now, therefore, it is ordered:

1. This action may be maintained as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure on behalf of a class defined as all taxable subscribers to Centrex telephone service who were customers for such service of any one or more of the defendant operating companies at any time during the relevant period.*

2. Within thirty days from the date of this order, the defendants shall furnish to counsel for the plaintiffs a list setting forth, to the best of defendants' knowledge, (a) the name of each member of the class as defined in paragraph 1; (b) the name of the defendant or defendants of which each class member was a Centrex customer during the relevant period; and (c) the address of the most recent primary location of each Centrex system of each class member during the relevant period.

3. Within twenty days after the list provided for in paragraph 2 is furnished by defendants, plaintiffs shall give notice of the pendency of this action to each class member on such list by mailing to each class member, at the address furnished in response to paragraph 2(c), a notice, in the form annexed as Exhibit A, by certified mail, return

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*For Centrex systems located in the state of Colorado, the relevant period is the period between January 1, 1966 and the effective date of the establishment of separate Centrex CU station charges for exchange access and for intercommunication.

receipt requested, postage prepaid. Plaintiffs shall mail with such notice a form of request for exclusion in the form annexed as Exhibit B. If the return receipt sent with any of the envelopes mailed as provided above is not received by plaintiffs within two weeks after the completion of mailing, plaintiffs shall, within one week thereafter, mail an identical envelope to the same address by certified mail, return receipt requested, postage prepaid. Within ten days after such mailing, plaintiffs shall cause to be filed with the Court proof of mailing in conformity with this paragraph. Plaintiffs shall cause to be retained until further order of the Court, and shall permit all other parties to inspect, all return receipts received pursuant to this paragraph.

4. The costs of printing the notice and of the first mailing provided for in paragraph 3 shall be borne by plaintiffs; the costs of the second such mailing shall be borne by defendants. All such costs shall be subject to taxation at the conclusion of suit in accordance with such further order as the Court may enter.

5. Notice given in the form and in accordance with the provisions of paragraph 3 is hereby found to be the best notice practicable under the circumstances and sufficient to comply with the requirements of Rule 23(c)(2) of the Federal Rules of Civil Procedure.

6. Any class member who wishes to enter an appearance through its own counsel shall file such appearance with the Court not later than sixty days after the last date for the mailing of the notice to all class members as provided in paragraph 3.

7. Any class member wishing exclusion from the class shall mail the form of request for exclusion to a post office box to be maintained by the attorneys for the plaintiffs, but in the name of the clerk of the Court, postmarked not later than sixty days after the last date for the first mailing of the notice to all class members as provided in paragraph 3. Any class member who does not so request exclusion shall be included in the class. Within two weeks after the last date for the mailing of requests for exclusion, plaintiffs shall file with the Court a list of the names and addresses of the class members who have requested exclusion, together with the completed forms of request for exclusion received by plaintiffs.

U.S.D.J.

Entry of the foregoing order without further notice is hereby consented to as to form only:

New York, New York
December 8 , 1975

Nickerson, Kramer, Lowenstein,
Nessen, Kamin & Soll

By Robert M. Heller
A member of the firm
Attorneys for Plaintiffs
919 Third Avenue
New York, New York 10022
212 688-1100

Davis Polk & Wardwell

By Guy Miller Struve
A member of the firm
Attorneys for Defendants
and Third-Party Plaintiffs
One Chase Manhattan Plaza
New York, New York 10005
212 HA 2-3400

Thomas J. Cahill, United States
Attorney for the Southern
District of New York

By William G. Ballaine
Attorney for Third-Party
Defendant
One St. Andrew's Plaza
New York, New York 10007
212 791-0054

Exhibit A

LEGAL NOTICE

Order on Consent filed December 10, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

DUPONT GLORE FORGAN INCORPORATED, THE HOME INSURANCE COMPANY, MONSANTO COMPANY, REYNOLDS SECURITIES, INC., SCHENLEY INDUSTRIES, INC., and SWIFT & COMPANY, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

- against -

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, CINCINNATI BELL, INC., DIAMOND STATE TELEPHONE COMPANY, ILLINOIS BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY, MICHIGAN BELL TELEPHONE COMPANY, THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, NEW JERSEY BELL TELEPHONE COMPANY, NEW YORK TELEPHONE COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, THE OHIO BELL TELEPHONE COMPANY, PACIFIC NORTHWEST BELL TELEPHONE COMPANY, PACIFIC TELEPHONE AND TELEGRAPH COMPANY, SOUTH CENTRAL BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, SOUTHERN NEW ENGLAND TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY and WISCONSIN TELEPHONE COMPANY,

Defendants and Third-Party Plaintiffs,

- against -

UNITED STATES OF AMERICA,

Third-Party Defendant.

- -X

73 Civ. 2447 (EW)

Notice Of
Class Action
Determination

To subscribers to Centrex telephone service during the relevant period (as defined below)

This notice is directed to all taxable customers of one or more operating telephone companies of the Bell system, as hereafter defined, who utilized Centrex telephone service during the whole or any portion of the period from January 1, 1966 through the effective date of the establishment of separate Centrex station charges for exchange access and for intercommunication, which took place on or before December 31, 1972, depending upon the location (hereafter the "relevant period"). It is sent to such customers pursuant to an order of the United States District Court for the Southern District of New York, since such customers constitute the members of the class on whose behalf the above-captioned litigation has been brought.

THE SENDING OF THIS NOTICE IS NOT TO BE CONSTRUED AS AN EXPRESSION OF ANY OPINION BY THE COURT AS TO THE MERITS OF THE CASE. [This sentence will be printed in bold face type.]

Please read the notice with care.

Description of the litigation

Sections 4251 through 4254 of the Internal Revenue Code impose an excise tax on amounts paid for telephone service. The sections were amended by the Excise Tax Reduction Act of 1965 (the "Act"); the litigation has its genesis in these amendments.

Section 4251, as amended in 1965, provides that the excise tax shall be payable on amounts paid for, among other things, "local telephone service," as defined in §4252. As amended in 1965, §4252 excludes from the definition of "local telephone service" any service that is a "private communication service," which, in turn, is defined as, among other things, communication service furnished to a subscriber which entitles the subscriber to the use of an intercommunication system for the subscriber's telephone stations, "except that such term does not include any communication service unless a separate charge is made for such service."

The operating companies of the Bell System -- all of the defendants in the litigation, other than American Telephone and Telegraph Company, are operating companies -- make available to subscribing customers Centrex telephone service. Centrex service enables customers to engage both in communication with other telephone stations in the same Centrex system ("intercommunication") and in communication through the local telephone exchange and the general telephone network with other telephone subscribers ("exchange access"). During the relevant period -- i.e., from January 1, 1966 until various dates in 1971 or 1972, depending upon the state or locality in question -- the operating companies of the Bell System collected a single Centrex station charge covering both intercommunication and exchange access, as called for by the applicable Centrex tariffs filed with state and local regulatory authorities; in the words of the Act, no "separate charge" was made for the "private communication service" covered by the Centrex station charge.

The plaintiffs in the litigation, all of whom were Centrex customers of one or more of the operating companies of the Bell System, commenced this litigation in mid-1973.* The complaint, brought by the plaintiffs on their own behalf and on behalf of a class comprised of all Centrex customers of any of the operating companies of the Bell System during all or any part of the relevant period who were subject to the federal communications excise tax,**alleges that the defendants, though capable of doing so, wrongfully failed to make a separate Centrex station charge for Centrex intercommunication service, so that Centrex customers paid the excise tax not only upon Centrex exchange access service, but on Centrex intercommunication service as well.

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*When the litigation was begun all six of the corporations shown in the caption of the action were plaintiffs. Since that time, duPont Glore Forgan Incorporated, The Home Insurance Company and Swift & Company have withdrawn from the suit as named plaintiffs; the plaintiffs now prosecuting the action are Monsanto Company, Reynolds Securities, Inc. and Schenley Industries, Inc.

Before taking any action in the case, the United States District Judge to whom the case has been assigned, the Honorable Edward Weinfeld, informed the parties that he owned 200 common shares of defendant American Telephone and Telegraph Company. All of the named plaintiffs and the defendants stipulated that this constitutes an insubstantial financial interest within the meaning of Canon 3D of the Code of Judicial Conduct and that the resulting disqualification should therefore be waived and remitted. Pursuant to this stipulation, Judge Weinfeld has continued to act as the District Judge in charge of the present case.

**Sections 4253, 4292, 4293 and 4294 of the Internal Revenue Code exempt federal, state and local governments, nonprofit hospitals, nonprofit educational organizations, and certain other customers from the federal communications excise tax.

In substance, the complaint pleads three alternative theories in support of the claims alleged: (i) it asserts that all Centrex subscribers during the relevant period were damaged through excise tax overcharges consequent upon the defendants' allegedly wrongful failure to establish separate Centrex station charges for exchange access and for intercommunication, as the complaint alleges was required by the Act, the Federal Communications Act, and principles of federal common law; (ii) in the alternative, the complaint alleges that there were in fact sufficient cost data and accounting records in the possession of the defendant operating companies to satisfy the "separate charge" requirement of the Act, and asserts that the defendant operating companies collected from Centrex customers, and paid over to the United States of America, a greater amount of excise tax than Centrex customers were required by law to pay; and (iii) it claims that the defendants' failure to separate Centrex station charges and the consequent collection of excise taxes on the entirety of such charges was the result of a combination and conspiracy among the defendants in violation of certain provisions of the federal antitrust laws.

The complaint seeks damages on behalf of the plaintiffs and members of the class in an amount measured by the difference between the excise taxes that would have been paid by each Centrex customer, had the defendants established separate Centrex station charges for exchange access and for intercommunication effective January 1, 1966 rather than at the end of the relevant period, and the taxes actually collected from such customer and paid over to the United States of America.*

The defendants have denied the material allegations of the complaint and have interposed various affirmative defenses. Defendants' contentions include (1) the assertion that the Court lacks jurisdiction over the subject matter of the suit; (2) the defenses of lack of personal jurisdiction and improper venue as to the defendant operating companies other than New York Telephone Company, which do not render telephone service in the Southern District of New York; (3) the defense that the defendant operating companies at all relevant times collected Centrex station charges as required by the applicable tariffs filed with the state and local regulatory authorities, and that the sole remedy of any Centrex customer which desired the establishment of separate Centrex station charges for exchange access and for intercommunication was to make a timely application to such authorities pursuant to the applicable state public utility statutes; (4) the contention that the named plaintiffs -- which received Centrex service during the relevant period only from defendants New York Telephone

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*On their antitrust claim (which is denominated (iii) in the immediately preceding paragraph) plaintiffs seek treble damages.

Company and Southwestern Bell Telephone Company -- lack standing to represent Centrex customers of other defendant operating companies; (5) the contention that the applicable statutes of limitation bar the claims in the complaint; and (6) the allegation that the plaintiffs' rights, if any, are against the United States, on whose behalf the excise taxes were collected and to which they were remitted pursuant to law, and not against the defendants.

In addition to their answer, the defendants have impleaded the United States of America as a third-party defendant, asserting, in substance, a right to indemnification from it. The government has answered the third-party complaint, alleging, among other defenses, lack of subject matter jurisdiction over the United States, failure to file appropriate administrative claims for tax refund, and that there was no overcollection of federal excise taxes.

In a decision rendered in September, 1975, the Court determined that the suit is maintainable as a class action on behalf of all taxable subscribers to Centrex telephone service who were customers for such service of any one or more of the operating companies of the Bell System at any time during the relevant period. The records of the defendants indicate that there are approximately 1,100 members of the class, as so defined. All, or virtually all, of the class members are corporations or other entities.

The rights and obligations of class members

Those within the class, as above defined, need not take any action in response to this notice to be included in the class. Those included in the class will be bound by any judgment entered in the litigation, whether or not such judgment is favorable to the class.

Anyone within the class, as above defined, may seek exclusion therefrom by completing and returning the enclosed form of request for exclusion to the address indicated upon it, postmarked on or before (insert the date sixty days after the last date for the mailing of the first notice to all class members as provided in paragraph 3 of the foregoing order). Anyone not requesting exclusion within the time just stated will be included in the class and bound by any judgment entered in the litigation.

Those electing exclusion from the class will not receive the benefits of any judgment favorable to the class that may be entered in the litigation and, correspondingly, will not be bound by any judgment adverse to the class. In deciding whether to request exclusion, class members may wish to consider, among other things, (1) the nature of the claims and the principal defenses in this action, as set forth above; (2) the obligations of class members that do not request exclusion, as set forth below; and (3) whether any suit of their own that they might thereafter elect to initiate against any of the defendants with respect to the matters alleged in the plaintiffs' complaint would be barred by the applicable statutes of limitation.

Any member of the class who does not exclude itself therefrom may, if it desires, enter an appearance through its own counsel. Any such appearance must be filed with the Court on or before (insert the date sixty days after the last date for the mailing of the first notice to all class members as provided in paragraph 3 of the foregoing order). Those class members who do not enter an appearance through their own counsel will be represented in the litigation by the attorneys for the named plaintiffs.

In the event that the litigation results in a judgment favorable to the class, the fees of the attorneys for the plaintiffs, in an amount to be fixed by the Court, and the expenses incidental to prosecution of the litigation, will be payable out of the proceeds of such judgment.

Inspection of pleadings and other court papers

The file of pleadings and proceedings in the litigation is available for inspection, Mondays through Fridays, holidays excepted, at usual business hours, at the office of the clerk of the United States District Court for the Southern District of New York, 40 Centre Street, New York, New York 10007.

The attorneys representing the named plaintiffs are Messrs. Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, 919 Third Avenue, New York, New York 10022, telephone number (212) 688-1100. The attorneys representing the defendants are Messrs. Davis Polk & Wardwell, 1 Chase Manhattan Plaza, New York, New York 10005, telephone number (212) HA 2-3400. The attorney representing the United States of America is the United States Attorney for the Southern District of New York, One St. Andrew's Plaza, New York, New York 10007, telephone number (212) 791-0054.

Inquiries concerning this notice or the litigation may be directed to the attorneys for the plaintiffs, whose name, address and telephone number appear above, or to the clerk of the Court.

New York, New York
December , 1975

Clerk, United States District Court
for the Southern District of New York

Exhibit B

Order on Consent filed December 10, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

DUPONT GLORE FORGAN
INCORPORATED, et al.,

Plaintiffs,

- against -

73 Civ. 2447 (EW)

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

Request For Exclusion

- against -

UNITED STATES OF AMERICA,

Third-Party Defendants.

- -X

COMPLETE AND RETURN THIS FORM ONLY IF
YOU WISH TO BE EXCLUDED FROM THE CLASS

To: Clerk, United States District Court
for the Southern District of New York
Post Office Box
Station
New York, New York

The undersigned requests exclusion from the class as defined in the notice of class determination, dated 1975.

1. Name of Centrex subscriber requesting exclusion ______________________________

2. Address of Centrex subscriber requesting exclusion ______________________________
____

3. Locations of Centrex service in the event there be more than one (optional but requested by the Court) ______________________________
____

____
Signature

____
Office or position of
person completing this form

IMPORTANT

In order to be excluded from the class this request for exclusion should be mailed with a postmark on or before (insert the date sixty days after the last date for the mailing of the first notice to all class members as provided in paragraph 3 of the foregoing order) to:

Clerk, United States District Court
for the Southern District of New York
Post Office Box
Station
New York, New York

NOTICE OF CLASS ACTION DETERMINATION AND REQUEST FOR EXCLUSION

LEGAL NOTICE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DUPONT GLORE FORGAN INCORPORATED, THE HOME INSURANCE COMPANY, MONSANTO COMPANY, REYNOLDS SECURITIES, INC., SCHENLEY INDUSTRIES, INC., and SWIFT & COMPANY, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, CINCINNATI BELL, INC., DIAMOND STATE TELEPHONE COMPANY, ILLINOIS BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY, MICHIGAN BELL TELEPHONE COMPANY, THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, NEW JERSEY BELL TELEPHONE COMPANY, NEW YORK TELEPHONE COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, THE OHIO BELL TELEPHONE COMPANY, PACIFIC NORTHWEST BELL TELEPHONE COMPANY, PACIFIC TELEPHONE AND TELEGRAPH COMPANY, SOUTH CENTRAL BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, SOUTHERN NEW ENGLAND TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY and WISCONSIN TELEPHONE COMPANY,

Defendants and Third-Party Plaintiffs,

—against—

UNITED STATES OF AMERICA,

Third-Party Defendant.

73 Civ. 2447 (EW)

Notice of Class Action Determination

To subscribers to Centrex telephone service during the relevant period (as defined below)

This notice is directed to all taxable customers of one or more operating telephone companies of the Bell system, as hereafter defined, who utilized Centrex telephone service during the whole or any portion of the period from January 1, 1966 through the effective date of the establishment of separate Centrex station charges for exchange access and for intercommunication, which took place on or before December 31, 1972, depending upon the location (hereafter the "relevant period"). It is sent to such customers pursuant to an order of the United States District Court for the Southern District of New York, since such customers constitute the members of the class on whose behalf the above-captioned litigation has been brought.

THE SENDING OF THIS NOTICE IS NOT TO BE CONSTRUED AS AN EXPRESSION OF ANY OPINION BY THE COURT AS TO THE MERITS OF THE CASE.

Please read the notice with care.

Notice of Class Action Determination and Request for Exclusion

Description of the litigation

Sections 4251 through 4254 of the Internal Revenue Code impose an excise tax on amounts paid for telephone service. The sections were amended by the Excise Tax Reduction Act of 1965 (the "Act"); the litigation has its genesis in these amendments.

Section 4251, as amended in 1965, provides that the excise tax shall be payable on amounts paid for, among other things, "local telephone service," as defined in § 4252. As amended in 1965, § 4252 excludes from the definition of "local telephone service" any service that is a "private communication service," which, in turn, is defined as, among other things, communication service furnished to a subscriber which entitles the subscriber to the use of an intercommunication system for the subscriber's telephone stations, "except that such term does not include any communication service unless a separate charge is made for such service."

The operating companies of the Bell System—all of the defendants in the litigation, other than American Telephone and Telegraph Company, are operating companies—make available to subscribing customers Centrex telephone service. Centrex service enables customers to engage both in communication with other telephone stations in the same Centrex system ("intercommunication") and in communication through the local telephone exchange and the general telephone network with other telephone subscribers ("exchange access"). During the relevant period—*i.e.*, from January 1, 1966 until various dates in 1971 or 1972, depending upon the state or locality in question—the operating companies of the Bell System collected a single Centrex station charge covering both intercommunication and exchange access, as called for by the applicable Centrex tariffs filed with state and local regulatory authorities; in the words of the Act, no "separate charge" was made for the "private communication service" covered by the Centrex station charge.

The plaintiffs in the litigation, all of whom were Centrex customers of one or more of the operating companies of the Bell System, commenced this litigation in mid-1973.* The complaint, brought by the plaintiffs on their own behalf and on behalf of a class comprised of all Centrex customers of any of the operating companies of the Bell System during all or any part of the relevant period who were subject to the federal communications excise tax,** alleges that the defendants, though capable of doing so, wrongfully failed to make a separate Centrex station charge for Centrex intercommunication service, so that Centrex customers paid the excise tax not only upon Centrex exchange access service, but on Centrex intercommunication service as well.

In substance, the complaint pleads three alternative theories in support of the claims alleged: (i) it asserts that all Centrex subscribers during the relevant period were damaged through excise tax overcharges consequent upon the defendants' allegedly wrongful failure to establish separate Centrex station charges for exchange access and for intercommunication, as the complaint alleges was required by the Act, the Federal Communications Act, and principles of federal common law; (ii) in the alternative, the complaint alleges that there were in fact sufficient cost data and accounting records in the possession of the defendant operating companies to satisfy the "separate charge" requirement of the Act, and asserts that the defendant operating companies collected from Centrex customers, and paid over to the United States of America, a greater amount of excise tax than Centrex customers were required by law to pay; and (iii) it claims that the defendants' failure to separate Centrex station charges and the consequent collection of excise taxes on the entirety of such charges was the result of a combination and conspiracy among the defendants in violation of certain provisions of the federal antitrust laws.

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* When the litigation was begun all six of the corporations shown in the caption of the action were plaintiffs. Since that time, duPont Glore Forgan Incorporated, The Home Insurance Company and Swift & Company have withdrawn from the suit as named plaintiffs; the plaintiffs now prosecuting the action are Monsanto Company, Reynolds Securities, Inc. and Schenley Industries, Inc.

Before taking any action in the case, the United States District Judge to whom the case has been assigned, the Honorable Edward Weinfeld, informed the parties that he owned 200 common shares of defendant American Telephone and Telegraph Company. All of the named plaintiffs and the defendants stipulated that this constitutes an insubstantial financial interest within the meaning of Canon 3D of the Code of Judicial Conduct and that the resulting disqualification should therefore be waived and remitted. Pursuant to this stipulation, Judge Weinfeld has continued to act as the District Judge in charge of the present case.

** Sections 4253, 4292, 4293 and 4294 of the Internal Revenue Code exempt federal, state and local governments, nonprofit hospitals, nonprofit educational organizations, and certain other customers from the federal communications excise tax.

The complaint seeks damages on behalf of the plaintiffs and members of the class in an amount measured by the difference between the excise taxes that would have been paid by each Centrex customer, had the defendants established separate Centrex station charges for exchange access and for intercommunication effective January 1, 1966 rather than at the end of the relevant period, and the taxes actually collected from such customer and paid over to the United States of America.*

The defendants have denied the material allegations of the complaint and have interposed various affirmative defenses. Defendants' contentions include (1) the assertion that the Court lacks jurisdiction over the subject matter of the suit; (2) the defenses of lack of personal jurisdiction and improper venue as to the defendant operating companies other than New York Telephone Company, which do not render telephone service in the Southern District of New York; (3) the defense that the defendant operating companies at all relevant times collected Centrex station charges as required by the applicable tariffs filed with the state and local regulatory authorities, and that the sole remedy of any Centrex customer which desired the establishment of separate Centrex station charges for exchange access and for intercommunication was to make a timely application to such authorities pursuant to the applicable state public utility statutes; (4) the contention that the named plaintiffs—which received Centrex service during the relevant period only from defendants New York Telephone Company and Southwestern Bell Telephone Company—lack standing to represent Centrex customers of other defendant operating companies; (5) the contention that the applicable statutes of limitation bar the claims in the complaint; and (6) the allegation that the plaintiffs' rights, if any, are against the United States, on whose behalf the excise taxes were collected and to which they were remitted pursuant to law, and not against the defendants.

In addition to their answer, the defendants have impleaded the United States of America as a third-party defendant, asserting, in substance, a right to indemnification from it. The government has answered the third-party complaint, alleging, among other defenses, lack of subject matter jurisdiction over the United States, failure to file appropriate administrative claims for tax refund, and that there was no overcollection of federal excise taxes.

In a decision rendered in September, 1975, the Court determined that the suit is maintainable as a class action on behalf of all taxable subscribers to Centrex telephone service who were customers for such service of any one or more of the operating companies of the Bell System at any time during the relevant period. The records of the defendants indicate that there are approximately 1,100 members of the class, as so defined. All, or virtually all, of the class members are corporations or other entities.

The rights and obligations of class members

Those within the class, as above defined, need not take any action in response to this notice to be included in the class. Those included in the class will be bound by any judgment entered in the litigation, whether or not such judgment is favorable to the class.

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* On their antitrust claim (which is denominated (iii) in the immediately preceding paragraph) plaintiffs seek treble damages.

Anyone within the class, as above defined, may seek exclusion therefrom by completing and returning the enclosed form of request for exclusion to the address indicated upon it, postmarked on or before March 29, 1976. Anyone not requesting exclusion within the time just stated will be included in the class and bound by any judgment entered in the litigation.

Those electing exclusion from the class will not receive the benefits of any judgment favorable to the class that may be entered in the litigation and, correspondingly, will not be bound by any judgment adverse to the class. In deciding whether to request exclusion, class members may wish to consider, among other things, (1) the nature of the claims and the principal defenses in this action, as set forth above; (2) the obligations of class members that do not request exclusion, as set forth below; and (3) whether any suit of their own that they might thereafter elect to initiate against any of the defendants with respect to the matters alleged in the plaintiffs' complaint would be barred by the applicable statutes of limitation.

Any member of the class who does not exclude itself therefrom may, if it desires, enter an appearance through its own counsel. Any such appearance must be filed with the Court on or before March 29, 1976. Those class members who do not enter an appearance through their own counsel will be represented in the litigation by the attorneys for the named plaintiffs.

In the event that the litigation results in a judgment favorable to the class, the fees of the attorneys for the plaintiffs, in an amount to be fixed by the Court, and the expenses incidental to prosecution of the litigation, will be payable out of the proceeds of such judgment.

Inspection of pleadings and other court papers

The file of pleadings and proceedings in the litigation is available for inspection, Mondays through Fridays, holidays excepted, at usual business hours, at the office of the clerk of the United States District Court for the Southern District of New York, 40 Centre Street, New York, New York 10007.

The attorneys representing the named plaintiffs are Messrs. Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, 919 Third Avenue, New York, New York 10022, telephone number (212) 688-1100. The attorneys representing the defendants are Messrs. Davis Polk & Wardwell, 1 Chase Manhattan Plaza, New York, New York 10005, telephone number (212) HA 2-3400. The attorney representing the United States of America is the United States Attorney for the Southern District of New York, One St. Andrew's Plaza, New York, New York 10007, telephone number (212) 791-0054.

Inquiries concerning this notice or the litigation may be directed to the attorneys for the plaintiffs, whose name, address and telephone number appear above.

New York, New York
January 7, 1976

RAYMOND F. BURGHARDT
Clerk, United States District Court
for the Southern District of New York

Notice of Class Action Determination and Request for Exclusion

Request For Exclusion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DUPONT GLORE FORGAN INCORPORATED, *et al.*,

Plaintiffs,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

Defendants and Third-Party Plaintiffs,

—against—

UNITED STATES OF AMERICA,

Third-Party Defendant.

73 Civ. 2447 (EW)

COMPLETE AND RETURN THIS FORM ONLY IF
YOU WISH TO BE EXCLUDED FROM THE CLASS

To:

Clerk, United States District Court
for the Southern District of New York
Post Office Box 2335
General Post Office
New York, New York 10001

The undersigned requests exclusion from the class as defined in the notice of class determination, dated January 7, 1976.

1. Name of Centrex subscriber requesting exclusion ....
2. Address of Centrex subscriber requesting exclusion ....
....
3. Locations of Centrex service in the event there be more than one (optional but requested by the Court) ....
....

....
Signature

....
Office or position of
person completing this form

IMPORTANT

In order to be excluded from the class this request for exclusion should be mailed with a postmark on or before March 29, 1976 to:

Clerk, United States District Court for the Southern District of New York
Post Office Box 2335
General Post Office
New York, New York 10001

NOTICE OF MOTION OF THIRD-PARTY DEFENDANT FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-------------------------------------x

DUPONT GLORE FORGAN INCORPORATED,
et al.,
Plaintiffs, :
-v-

AMERICAN TELEPHONE AND TELEGRAPH :
COMPANY, et al.,

Defendants and Third- :
Party Plaintiffs,

-v- :

UNITED STATES OF AMERICA,
:
Third-Party Defendant.

-------------------------------------x

NOTICE OF MOTION
BY THIRD-PARTY
DEFENDANT UNITED
STATES FOR SUMMARY
JUDGMENT

73 Civ. 2447 (EW)

PLEASE TAKE NOTICE that upon the pleadings herein and the annexed statement pursuant to Rule 9(g) of the General Rules of this Court, Third-Party Defendant United States of America, will move this Court before the Honorable Edward Weinfeld at 2:15 p.m. on December 28, 1976, or as soon thereafter as counsel may be heard, at Room 2703 of the United States Courthouse, Foley Square, New York, New York, pursuant to Rule 56 of the Federal Rules of Civil Procedure for: (1) an order granting summary judgment in favor of such Third-Party Defendant dismissing the Third-Party Complaint of Defendants-Third-Party Plaintiffs for lack of subject matter jurisdiction; (2) an order granting partial summary judgment in favor of Third-Party Defendant dismissing all claims of Defendants-Third Party Plaintiffs except those claims covered by an administrative tax refund claim which was filed by the Defendant within 3 years from the date on which said Defendant was required to file the tax return to which the refund claim relates; and (3) such other and further relief as the Court deems just and proper.

Dated: New York, New York

December 15, 1976.

DANIEL R. MURDOCK
Acting United States Attorney
for the Southern District of
New York - Attorney for United
States.

By: ______________________
WILLIAM G. BALLAINE
Assistant United States Attorney
Office & Post Office Address:
United States Attorneys Office
One St. Andrew's Plaza
New York, New York 10007
Tel.: (212) 791-0054

TO: DAVIS POLK & WARDWELL
Attorneys for Defendants &
Third-Party Plaintiffs
One Chase Manhattan Plaza
New York, New York 10005

NICKERSON, KRAMER, LOWENSTEIN,
NESSEN, KAMIN & SOLL
Attorney for Plaintiffs
919 Third Avenue
New York, New York 10022

GILBERT SEGALL & YOUNG
Attorneys for Plaintiff
Delta Air Lines, Inc.
430 Park Avenue
New York, New York 10002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DUPONT GLORE FORGAN INCORPORATED, et al.,
Plaintiffs,

-v-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,
Defendants and Third-Party Plaintiffs,

-v-

UNITED STATES OF AMERICA,
Third-Party Defendant.

THIRD-PARTY DEFENDANT'S RULE 9(g) STATEMENT

73 Civ. 2247 (EW)

Pursuant to Rule 9(g) of the General Rules of this Court, and solely for purposes of Third-Party Defendant's Motion for Summary Judgment, the United States of America submits this statement of material facts as to which it contends there is no genuine issue to be tried:

1. Defendant American Telephone and Telegraph Company ("AT&T") did not collect any of the Federal communications excise taxes in issue (the "taxes in issue") and did not file any Form 843 administrative refund claims with respect to the taxes in issue. [Answers and Objections to Third-Party Defendant's Interrogatories of Defendants filed by AT&T, nos. 1, 2.]

2. All of the remaining defendants (the "operating companies") collected the taxes in issue during various periods from January 1966 until December 1972, and, pursuant to applicable Federal law and regulation, each operating company timely filed a Form 720 Quarterly Federal Excise Tax Return with respect to each tax quarter during which the taxes in issue were collected. The tax quarters were January - March (first quarter), April - June (second quarter), July - September (third quarter) and October - December (fourth quarter). [Answers and Objections to Third-Party Defendant's Interrogatories of Defendants filed by each operating company, no. 2*.]

3. Each Form 720 Quarterly Federal Excise Tax Return filed by an operating company reflected the total amount of communications excise taxes collected by the operating company from all persons upon whom such taxes were imposed pursuant to Sections 4251-54 of the Internal Revenue Code of 1954 as amended (the "Code"). This total amount included but did not separately indicate the amount of the taxes in issue. Pursuant to applicable Federal law and regulation, each operating company timely paid over to the United States the total amount of communications excise

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* An asterisk indicates that the material fact is based, in whole or in part, upon information contained in a document made available for inspection by a party in response to an interrogatory posed by the United States.

taxes collected during each tax quarter for which a Quarterly Excise Tax Return was filed. [Answers and Objections to Third-Party Defendant's Interrogatories of Defendants filed by each operating company, no. 2*.]

4. Each operating company filed a Form 843 administrative refund claim with the Internal Revenue Service for each tax quarter during which the taxes in issue were collected by the operating company. With rare exception these refund claim forms covered all tax quarters from 1966 through 1972. Each refund claim form stated that the amount to be refunded was "$1,000 or such amount as is legally refundable with interest thereon as provided by law." and each form attached an identical statement in support of the claim. Each operating company also filed, in connection with its claims, a copy of the complaint in this action. Attached hereto is a copy of the refund claim form (excluding a copy of the complaint) filed by New York Telephone Company for the first quarter, 1966, which includes the statement in support of its claim. [Answers and Objections to Third-Party Defendant's Interrogatories of Defendants filed by each operating company, no. 1*.]

5. None of the refund claim forms contained any statement or furnished any evidence to establish that the taxes to which the refund claim related had been returned to the person from whom collected, or that the operating company had obtained the written consent of such person to the granting of the refund in favor of the operating company. [Answers and Objections to Third-Party Defendant's Interrogatories of Defendants filed by each operating company, no. 1*.]

6. In the box marked "Amount of assessment" on each refund claim form (see attached form filed by New York Telephone Company), each operating company indicated the total amount of communications excise taxes collected by the operating company from all persons upon whom such taxes were imposed pursuant to Sections 4251-54 of the Code, as reflected on the appropriate Form 720 Quarterly Federal Excise Tax Return filed by the operating company. [Answers and Objections to Third-Party Defendant's Interrogatories of Defendants filed by each operating company, nos. 1, 2.*]

7. With the exception of the Southern New England Telephone Company ("Southern New England") all operating companies filed their respective Form 843 administrative refund claim forms on various dates during July 1973. All of the refund claim forms covering the first quarter, 1970 and all prior tax quarters were filed more than three years after the dates on which the corresponding

Form 720 Quarterly Federal Excise Tax Returns had been filed and were required to have been filed by the operating companies under applicable Federal law and regulation. [Answers and objections to Third-Party Defendant's Interrogatories of Defendants filed by each operating company, nos. 1, 2.*.]

8. Southern New England filed its respective Form 843 administrative refund claim forms on February 20, 1974. All of the refund claim forms covering the third quarter, 1970 and all prior tax quarters were filed more than three years after the dates on which the corresponding Form 720 Quarterly Federal Excise Tax Returns had been filed and were required to have been filed by Southern New England under applicable Federal law and regulation. [Answers and Objections to Third-Party Defendant's Interrogatories of Defendants filed by Southern New England, nos. 1, 2*.]

9. Except to the extent that the prosecution of the present action may constitute consent, none of the operating companies has obtained consent to the allowance of a refund from the person(s) from whom the operating company collected the taxes in issue and none of the operating companies has returned the taxes in issue to the person(s) from whom it had been collected. Nor has any operating company overpaid from its own funds to the Government the taxes in issue. [Answers and Objections to

Third-Party Defendant's Interrogatories of Defendants filed by the operating companies, nos. 3,4,5.]

10. The three named plaintiffs presently state that they have not given their consent to the operating companies to the allowance of a refund of the taxes in issue in favor of said operating companies. [Answers and Objections to Third-Party Defendant's Interrogatories of Plaintiffs, no. 2.]

11. The three named plaintiffs have each filed Form 843 administrative refund claims with respect to the taxes in issue, which claims are still pending, and no tax refund action relating to such claims has been commenced against the United States by any of the three plaintiffs. [Answers and Objections to Third-Party Defendant's Interrogatories of Plaintiffs, no. 1.]

12. Other than the Form 843 administrative refund claims previously described herein, no other document has been filed by the operating companies for purposes of complying with Section 7422(a) of the Code. [Answers and Objections to Third-Party Defendant's Interrogatories of Defendants, no. 7(a),(b).]

13. Defendants claim that the court has jurisdiction over their claim in tort against the United States under 28 U.S.C. § 1346(b) by reason of the alleged fact that:

WGB:lm

each operating company collected and paid over to the United States Federal communications excise tax on the total unrestricted Centrex station charge for the period from January 1, 1966 through the date when the revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication became effective; each collected such amounts and remitted them to the United States as agent for the United States, pursuant to 26 U.S.C. §§ 4291 and 7501 and related legal authorities; duly authoriz representatives of the United States accepted and retained all Federal communications excise taxes remitted; during this period the United States was aware that the Centrex tariffs did not contain separate Centrex station charges for exchange access and for intercommunication; and thus to the extent that the Court may rule that an operating company committed any negligent or wrongful act or omission in collecting and paying over to the United States any amounts of Federal communications excise tax on Centrex station charges, the United States likewise committed a negligent or wrongful act or omission in collecting, accepting, auditing, or retaining such amounts. [Answers and Objections to Third-Party Defendant's Interrogatories of Defendants, no. 11.]

Dated: New York, New York
December 15, 1976.

DANIEL R. MURDOCK
Acting United States Attorney
for the Southern District of
New York -Attorney for United
States.

By: ______________________

WILLAIM C. BALLAINE
Assistant United States Attorney
One St. Andrew's Plaza, N.Y.
Tel.: (212) 791-0054

EXHIBIT A 06555

Form 843
(Rev. Jan. 1973)
Department of the Treasury
Internal Revenue Service

Claim

District's Stamp
(Date received)
RECD
NOT
JUL 11 1973
INT. REV. SERVICE
MANHATTAN NY

The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to income, estate or gift taxes).

Please print or type

Name [illegible] Claimant:
New York Telephone Company

Number and street
140 West Street, Room 2730

City or town, State, and ZIP code
New York City, New York 10007

Fill in applicable items—Use attachments if necessary

a. Your social security number
Wife's number, if joint return
b. Employer identification number (if any) 13-5275510

c. Internal Revenue Service office where return (if any) was filed
120 Church Street, New York City, New York

d. Name and address shown on return, if different from above

e. Period—if for tax reported on annual basis, prepare separate form for each taxable year
From January 1, 1966 to March 31, 1966

f. Kind of tax
Communications Excise Tax

g. Amount of assessment
$ 10,331,334.73

Dates of payment
June 9, 1966

h. Date stamps were purchased from Government

i. Amount to be refunded (If income tax, complete computation below)
1,000 or such amount as is legally refundable wi
interest thereon as provided by law.

j. Amount to be abated (not applicable to income, estate, or gift taxes)

k. The claimant believes that this claim should be allowed for the following reasons:

(See attached statement)

Computation of Income Tax Refund	Income Tax
1 Tax withheld	
2 Estimated tax paid	
3 Tax paid with original return	
4 Any additional income tax paid	
5 Total tax paid (add lines 1–4)	
6 Less: Your computation of correct tax	
7 Amount of overpayment	
8 Amount previously refunded	
9 Net overpayment (enter in item i above)	

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed NEW YORK TELEPHONE COMPANY

Dated July 11, 1973 By (Sgd.) R.J. Marano
Vice President & Comptroller

See instructions on reverse

Form 843 (Rev. 1-73)

Third-Party Defendant's Rule 9(g) Statement

This claim is filed by Claimant for refund of any amount of Federal Communications with which Claimant may be obligated to pay to its customers as a result of the legal action described below. This tax was imposed under Code Section 4251 upon amounts collected by Claimant from its customers for a communication service known as "Centrex" service during the period covered by this claim and was collected from the customers by Claimant as a collection agency of the United States Government.

On June 1, 1973 an action was brought in the United States District Court for the Southern District of New York by Dupont Glore Forgan Inc., The Home Insurance Co., Monsanto Co., Reynolds Securities, Inc., Schenley Industries, Inc., and Swift and Co., on their own behalf and on behalf of all others similarly situated against the American Telephone and Telegraph Company and its subsidiaries. Claimant is a subsidiary of American Telephone and Telegraph Company. A copy of the complaint is attached as Exhibit A to the Form 843 filed by Claimant for the first quarter of 1966.

Plaintiffs allege in their complaint that from January 1, 1966 until recently, Claimant as a party defendant, collected a greater amount in excise taxes than they were entitled to collect under the law. Plaintiffs allege that the over-collection was a result of Claimant's failure to exempt from taxation a portion of its charge for "Centrex" service, which they allege qualified for exemption under the authority of Revenue Ruling 69-152, 1969-1 C.B. 289.

Claimant is of the opinion that the Federal Communication Tax has been legally collected. Claimant is also of the opinion that the United States District Court lacks jurisdiction to entertain a tax refund suit against any person other than the United States.

However, this claim is being filed on behalf of Claimant to protect Claimant should the court rule it has jurisdiction to entertain the suit and further rules that Claimant is liable for the alleged overcollection of the excise tax and must refund said tax to its customers.

This claim is filed prior to the conclusion of the legal proceedings in order that the rights and remedies of Claimant will be protected and preserved from any statute of limitations that could be asserted as a bar against the refund of any taxes for which Claimant may be liable as a result of the aforementioned legal action. If the ultimate result of the legal action should require Claimant to refund any amount of tax, Claimant will then be able to establish, as required by Code Section 6415, that the communications tax has been repaid to the taxpayers from whom it was collected.

On or before the due date, Claimant filed a Quarterly

Federal Excise Tax Return. This return showed a net tax due for the quarter indicated in block e. of the amount shown in block g. This amount was deposited in full in various authorized Government depositories during previous months in the amounts and at the time required under law and regulations.

DEFENDANTS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

-against-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Third-Party Defendant.

- x

73 Civ. 2447 (EW)

NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Guy Miller Struve, sworn to on December 17, 1976, upon the annexed Statement Pursuant to General Rule 9(g), and upon all other papers and proceedings heretofore had herein, defendants and third-party plaintiffs will move this Court, Honorable Edward Weinfeld, U.S.D.J., in Room 2703, United States Court House, Foley Square, New York, New York 10007, on the 28th day of December, 1976, at 2:15 P.M. or as soon thereafter as counsel can be heard, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure dismissing Counts II, IV, and VI of plaintiffs' Complaint against defendants and third-party plaintiffs, and for such other and further relief as may be just and proper.

Dated: New York, New York
December 17, 1976

DAVIS POLK & WARDWELL

By
A Member of the Firm

1 Chase Manhattan Plaza
New York, New York 10005
HA 2-3400

Attorneys for Defendants
and Third-Party Plaintiffs

TO:

NICKERSON, KRAMER, LOWENSTEIN,
NESSEN, KAMIN & SOLL
919 Third Avenue
New York, New York 10022

Attorneys for Plaintiffs

GILBERT, SEGALL AND YOUNG
430 Park Avenue
New York, New York 10022

Attorneys for Plaintiff
Delta Air Lines, Inc.

DANIEL R. MURDOCK
Acting United States Attorney for
the Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

Attorney for Third-Party Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

-against-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Third-Party Defendant.

- x

73 Civ. 2447 (EW)

AFFIDAVIT IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

GUY MILLER STRUVE, being duly sworn, says:

1. I am a member of the Bar of this Court and of the firm of Davis Polk & Wardwell, attorneys for defendants and third-party plaintiffs. I make this affidavit in support of the motion of defendants and third-party plaintiffs for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure dismissing Counts II, IV, and VI of plaintiffs' Complaint against defendants and third-party plaintiffs.

2. The taxpayers with respect to the Federal communications excise taxes involved in the present action are the members of the plaintiff class. The defendant operating companies collected such taxes and paid them over to the United States of America.

3. In the present case the only claims for refund

filed with the Internal Revenue Service which have been produced by plaintiffs during discovery are individual claims for refund filed on their own behalf by four of the six original named plaintiffs in the present action, Monsanto Company, Reynolds Securities Inc., Schenley Industries, Inc., and Swift & Company. A copy of one of the claims for refund produced by Monsanto Company is annexed as Exhibit A. Except for names and addresses of companies, dates, and amounts of tax, the other claims for refund produced by plaintiffs during discovery in the present action are identical to Exhibit A.

4. Upon information and belief, no other member of the plaintiff class (with the possible exception of the other two original named plaintiffs, duPont Glore Forgan Incorporated and The Home Insurance Company) intends to introduce evidence at the trial of the present action to establish that it filed with the Internal Revenue Service any claims for refund with respect to the claims asserted in Counts II, IV, and VI of the Complaint in the present action (see Plaintiffs' Answers and Objections to Third-Party Defendant's Interrogatories of Plaintiffs, dated November 24, 1976, pp. 2-3).

WHEREFORE defendants and third-party plaintiffs respectfully request that this Court grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure dismissing Counts II, IV, and VI of plaintiffs' Complaint against defendants and third-party plaintiffs.

Guy Miller Struve

Sworn to before me this

17th day of December, 1976.

ROBERT D. DARNELL, JR.
Notary Public, State of New York
No. 31-0862425
Qualified in New York County
Commission Expires March 30, 1977

Form [illegible]
(Rev. Jan. 1973)
Department of the Treasury
Internal Revenue Service

Claim

Director's Stamp
(Date received)

AC0258

The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to income, estate or gift taxes).

Please print or type

Name of taxpayer or purchaser of stamps
Monsanto Company

Number and street
800 N. Lindbergh Boulevard

City or town, State, and ZIP code
St. Louis, Missouri 63166

Fill in applicable items—Use attachments if necessary

a. Your social security number
Wife's number, if joint return
b. Employer identification number (if any) 43-0420020

c. Internal Revenue Service office where return (if any) was filed Claimant files its returns with the Dis. Dir.
n St. Louis, Mo. The excise tax was collected, deposited, and returns filed by New
ork Telephone Co. Claimant does not know where N.Y.Tel.Co. files its returns.

d. Name and address shown on return, if different from above
New York Telephone Co.
140 West Street
New York, N. Y. 10007

e. Period—if for tax reported on annual basis, prepare separate form for each taxable year
From April 1 19 70 to June 30 19 70

f. Kind of tax Excise

g. Amount of assessment $

Dates of payment

h. Date stamps were purchased from Government

i. Amount to be refunded (If income tax, complete computation below) $See attached statement.

j. Amount to be abated (not applicable to income, estate, or gift taxes) $

k. The claimant believes that this claim should be allowed for the following reasons:

See attached statement

Computation of Income Tax Refund	Income Tax
1 Tax withheld	
2 Estimated tax paid	
3 Tax paid with original return	
4 Any additional income tax paid	
5 Total tax paid (add lines 1–4)	
6 Less: Your computation of correct tax	
7 Amount of overpayment	
8 Amount previously refunded	
9 Net overpayment (enter in item i above)	

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed
Assistant Treasurer

Dated June 26 19 73

See instructions on reverse.

Form 843 (Rev. 1-73)

EXHIBIT A

MONSANTO COMPANY

Excise Tax Claim For Refund Statement

Claimant has paid and New York Telephone Co. has billed and collected the federal excise tax on communication services imposed by § 4251 of the Internal Revenue Code on all its CENTREX equipment. Under § 4252 of the Internal Revenue Code, private communications systems and related equipment are exempt from the tax imposed by § 4251 whenever a separate charge is made therefor. In Revenue Ruling 69-152, 1969-1 C.B. 289, the Service ruled that where an operating telephone company maintained a separation of charges on its books but did not reflect such separation in its bills to its customers, those customers were nonetheless entitled to an exemption from the federal excise taxes for those charges for private communication services. In implementing the separation of charges on or about July ________, 1972, New York Telephone Co. used cost data and accounting records available to it since the institution of CENTREX service. The separation of charges either actually existed or was readily computable at all times since the institution of CENTREX service. Claimant has sued New York Telephone Co. in a class action to recover federal excise taxes illegally collected. Claimant, however, is entitled to a refund of the taxes erroneously and/or excessively imposed, collected, and paid on that portion of its CENTREX equipment used for private communications. Claimant does not now possess adequate information to precisely compute the amount of federal excise tax erroneously and/or excessively collected and paid.

Using the ratio of present taxes to taxes before the use of the separation in the billing ~~procedure~~, claimant believes, however that it is entitled to a refund at a rate of approximately $2.50 per CENTREX line per 3 month period. Since claimant has 470 lines, claimant believes it is entitled to a refund of $ 1175 for the period covered by this claim, plus interest and any other amounts which may be legally due. Since the amount claimed cannot be precisely stated, claim is made for $ 1175 or such greater amount as may be refundable.

DEFENDANT'S STATEMENT PURSUANT TO GENERAL RULE 9(g), DATED DECEMBER 17, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

DUPONT GLORE FORGAN INCORPORATED, :
et al., :
Plaintiffs, : 73 Civ. 2447 (EW)
-against- :
AMERICAN TELEPHONE AND TELEGRAPH :
COMPANY, et al., :
Defendants and Third- :
Party Plaintiffs, : STATEMENT PURSUANT TO GENERAL RULE 9(g)
-against- :
UNITED STATES OF AMERICA, :
Third-Party Defendant. :

- x

Defendants and third-party plaintiffs, in support of their motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure dismissing Counts II, IV, and VI of plaintiffs' Complaint, state the following facts as to which there is no genuine issue to be tried:

1. The taxpayers with respect to the Federal communications excise taxes involved in the present action are the members of the plaintiff class. The defendant operating companies collected such taxes and paid them over to the United States of America.

2. In the present case the only claims for refund filed with the Internal Revenue Service which have been produced by plaintiffs during discovery are individual claims for refund filed on their own behalf by four of the six original named plaintiffs in the present action, Monsanto Company, Reynolds Securities Inc., Schenley Industries, Inc. and Swift & Company. A copy of one of the claims for refund

produced by Monsanto Company is annexed as Exhibit A. Except for names and addresses of companies, dates, and amounts of tax, the other claims for refund produced by plaintiffs during discovery in the present action are identical to Exhibit A.

3. Upon information and belief, no other member of the plaintiff class (with the possible exception of the other two original named plaintiffs, duPont Glore Forgan Incorporated and The Home Insurance Company) intends to introduce evidence at the trial of the present action to establish that it filed with the Internal Revenue Service any claims for refund with respect to the claims asserted in Counts II, IV, and VI of the Complaint in the present action.

Dated: New York, New York
December 17, 1976

DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005
HA 2-3400

Attorneys for Defendants
and Third-Party Plaintiffs

Statement Pursuant to General Rule 9(g)

Form [illegible]
(Rev. Jan. 1973)
Department of the Treasury
Internal Revenue Service

Claim

Director's Stamp
(Date received)

AC0258

The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to income, estate or gift taxes).

Please print or type

Name of taxpayer or purchaser of stamps: Monsanto Company

Number and street: 800 N. Lindbergh Boulevard

City or town, State, and ZIP code: St. Louis, Missouri 63166

Fill in applicable items—Use attachments if necessary

a. Your social security number:

Wife's number, if joint return:

b. Employer identification number (if any): 43-0420020

c. Internal Revenue Service office where return (if any) was filed: Claimant files its returns with the Dis. Dir. St. Louis, Mo. The excise tax was collected, deposited, and returns filed by New York Telephone Co. Claimant does not know where N.Y.Tel.Co. files its returns.

d. Name and address shown on return, if different from above:

New York Telephone Co.
140 West Street
New York, N. Y. 10007

e. Period—if for tax reported on annual basis, prepare separate form for each taxable year: From April 1, 1970 to June 30, 1970

f. Kind of tax: Excise

g. Amount of assessment: $

Dates of payment:

h. Date stamps were purchased from Government:

i. Amount to be refunded (If income tax, complete computation below): $See attached statement.

j. Amount to be abated (not applicable to income, estate, or gift taxes): $

k. The claimant believes that this claim should be allowed for the following reasons:

See attached statement

Computation of Income Tax Refund	Income Tax
1 Tax withheld	
2 Estimated tax paid	
3 Tax paid with original return	
4 Any additional income tax paid	
5 Total tax paid (add lines 1–4)	
6 Less: Your computation of correct tax	
7 Amount of overpayment	
8 Amount previously refunded	
9 Net overpayment (enter in item i above)	

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed: Assistant Treasurer

Dated: June 26, 1973

See instructions on reverse.

Form 843 (Rev. 1–73)

EXHIBIT A

291a

Statement Pursuant to General Rule 9(g)

MONSANTO COMPANY

AC0259

Excise Tax Claim For
Refund Statement

Claimant has paid and New York Telephone Co. has billed and collected the federal excise tax on communication services imposed by § 4251 of the Internal Revenue Code on all its CENTREX equipment. Under § 4252 of the Internal Revenue Code, private communications systems and related equipment are exempt from the tax imposed by § 4251 whenever [illegible] rate charge is made therefor. In Revenue Ruling 69-152, 1969 [illegible].B. 289, the Service ruled that where an operating telephone company maintained a separation of charges on its books but did not reflect such separation in its bills to its customers, those customers were nonetheless entitled to an exemption from the federal excise taxes for those charges for private communication services. In implementing the separation of charges on or about July ______, 1977, New York Telephone Co. used cost data and accounting records available to it since the institution of CENTREX service. The separation of charges either actually existed or was readily computable at all times since the institution of CENTREX service. Claimant has sued New York Telephone Co. in a class action to recover federal excise taxes illegally collected. Claimant, however, is entitled to a refund of the taxes erroneously and/or excessively imposed, collected, and paid on that portion of its CENTREX equipment used for private communications. Claimant does not now possess adequate information to precisely compute the amount of federal excise tax erroneously and/or excessively collected and paid.

Using the ratio of present taxes to taxes before the use of the separation in the billing procedure, claimant believes, however that it is entitled to a refund at a rate of approximately $2.50 per CENTREX line per 3 month period. Since claimant has 470 lines, claimant believes it is entitled to a refund of $ 1175 for the period covered by this claim, plus interest and any other amounts which may be legally due. Since the amount claimed cannot be precisely stated, claim is made for $ 1175 or such greater amount as may be refundable.

DEFENDANTS' STATEMENT PURSUANT TO GENERAL RULE 9(g), DATED JANUARY 7, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

-against-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Third-Party Defendant.

- x

73 Civ. 2447
(EW)

STATEMENT
PURSUANT
TO GENERAL
RULE 9(g)

Defendants and third-party plaintiffs, pursuant to General Rule 9(g) of this Court, respond as follows to the indicated paragraph of Third-Party Defendant's Rule 9(g) Statement, submitted in support of the motion of third-party defendant United States of America for summary judgment dismissing the Third-Party Complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure:

13. There exists a genuine issue as to the factual and legal grounds upon which plaintiffs will seek to establish defendants' liability at trial, and therefore as to the characterization of such factual and legal grounds for purposes of the Federal Tort Claims Act, 28 U.S.C. §§

1346(b), 2671-2680.

Dated: New York, New York
January 7, 1977

DAVIS POLK & WARDWELL

By Guy Miller Struve
A Member of the Firm

1 Chase Manhattan Plaza
New York, New York 10005
HA 2-3400

Attorneys for Defendants
and Third-Party Plaintiffs

AFFIDAVIT OF EUGENE H. NICKERSON IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT; STATEMENT PURSUANT TO GENERAL RULE 9(g)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

DUPONT GLORE FORGAN, INC., et al.,

Plaintiffs,

- against -

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

- against -

UNITED STATES OF AMERICA,

Third-Party Defendant.

---X

73 Civ. 2447 (EW)

Affidavit

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Eugene H. Nickerson, being duly sworn, says:

1. I am a member of the firm of Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, attorneys for the plaintiff class and make this affidavit to oppose the motion of the defendants and third-party plaintiffs ("defendants") for partial summary judgment on Counts II, IV and VI of the complaint. Plaintiffs neither support nor oppose the motion of the third-party defendant for summary judgment.

2. In substance, plaintiffs' claim as set forth in the counts of the complaint not involved in this motion, namely,

Counts I, III, V, VII and VIII, is that for some six years defendants conspired, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and of their affirmative legal obligations to plaintiffs, not to separate Centrex station charges for exchange access and for intercommunication. The Excise Tax Reduction Act of 1965 ("the Act") created an exemption from the federal communications excise tax for "private communication service" (including Centrex intercommunication) on condition that a "separate charge" be stated for such service.* As a result of defendants' willful determination and conspiracy to continue a "package" rate for Centrex service, rather than to break out the intercommunication charge, plaintiffs were subjected to excessive federal communications excise taxes for approximately six years. We shall prove at trial that defendants' conspiracy to refuse to separate the Centrex station charge resulted from the conclusion of defendant American Telephone and Telegraph Company ("AT&T") that effecting separation through the filing of new tariffs could expose the rates for Centrex service to review and possible revision by state and local regulatory agencies and to attack by Centrex customers, risks deemed by AT&T as unjustified in defendants' own economic and competitive interests. Only in 1971-1972, when separation of Centrex station charges served the defendants' own competitive interests, did defendants separate those charges.

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*26 U.S.C. §4252(d).

3. Plaintiffs assert that this conspiracy to maintain the unseparated Centrex station charges, thus deliberately adding 10% to the price paid by plaintiffs for private communication service, violated Section 1 of the Sherman Act and damaged plaintiffs in the amount of the increased price. Plaintiffs also assert that as a result of defendants' failure to fulfill their legal obligations to plaintiffs to separate the Centrex station charges, plaintiffs were damaged in the amount of the increased price.

4. An alternative theory is set forth in the counts which are the subject of this motion, namely, Counts II, IV and VI. They allege that throughout the years 1966-1972 the existing entries on the books and records of the defendants satisfied the Act's "separate charge" requirement, as defined in Revenue Ruling 69-152, 1969 Cum. Bull. 289, and that defendants thus improperly collected taxes from plaintiffs. Plaintiffs will show at trial that such a "separate charge" existed. Defendants' present motion for summary judgment on these counts is not based on the theory that no such "separate charge" existed on their books and records.* Rather defendants argue that an action for overcollection of federal excise taxes can be brought only against the United States and not against private tax collectors, and that in any event the filing of an administrative claim for refund

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*We recognize that defendants' answer and their responses to certain of plaintiffs' interrogatories raise an issue of fact as to whether a "separate charge" existed on their books and records, and that therefore a cross-motion for summary judgment is not appropriate.

by each plaintiff is a prerequisite to an action for overcollection.

5. As shown in the accompanying memorandum of law, plaintiffs urge that the motion be denied and assert that (a) the law permits an action against a private party which has overcollected taxes and (b) filing a claim for refund is not a prerequisite to bringing the action against a private party (although the original six named plaintiffs filed claims for refund, as I am informed did many members of the plaintiff class).

6. We also submit that, in view of the interrelationship of the legal and factual issues presented and of the imminent appearance of the matter on this Court's ready calendar, it would be unwise to split off the issues now raised for separate resolution. Granting defendants' motion would not reduce the evidence offered at trial, while reviewing all the issues involved in Counts II, IV and VI would require an analysis of considerable technical detail and legislative history which will in any event be presented at trial.

For these reasons we respectfully request that the motion be denied.

Eugene H. Nickerson
Eugene H. Nickerson

Sworn to before me this
day of January, 1977.

Notary Public
MICHAEL S. O[illegible]AN
Notary Public, State of New York
No. 31-[illegible]0472
Qualified in New York County
Term Expires March 30, 19[illegible]

PLAINTIFFS' STATEMENT PURSUANT TO GENERAL RULE 9(g), DATED JANUARY 7, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-------------------------------------X

DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

- against -

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

- against -

UNITED STATES OF AMERICA,

Third-Party Defendant.

-------------------------------------X

73 Civ. 2447
(EW)

STATEMENT PURSUANT TO GENERAL RULE 9(g)

Plaintiffs, in opposition to the motion of the defendants and third-party plaintiffs for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure dismissing Counts II, IV and VI of the complaint, state the following facts as to which there is a genuine issue to be tried:

Without conceding that plaintiffs were required to file claims for refund with the Internal Revenue Service as a condition precedent to the maintenance of Counts II, IV and VI of the complaint, other members of the plaintiff class, in addition to the original six named plaintiffs, have, upon information and belief, filed claims for refund. Should the Court enter judgment for plaintiffs and determine that the filing of claims for refund with the Internal Revenue Service is a precondition to recovery by individual members of the class under Counts II, IV and VI, copies of all claims filed by members of the plaintiff class will be produced.

Dated: New York, New York
January 7, 1977

Nickerson, Kramer, Lowenstein,
Nessen, Kamin & Soll
Attorneys for Plaintiffs
919 Third Avenue
New York, New York 10022
(212) 688-1100

THIRD-PARTY DEFENDANT'S NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COURT
YORK
1-6-77

DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

-against-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Third-Party Defendant.

NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT

73 Civ. 2447 (EW)

SIRS:

PLEASE TAKE NOTICE that upon the annexed Statement Pursuant to General Rule 9(g), and upon all other papers and proceedings heretofore had herein, third-party defendant the United States will move this Court, before the Honorable Edward Weinfeld, U.S.D.J., in Room 1506, United States Court House, Foley Square, New York, New York, 10007, on the 25th day of January, 1977, at 2:15 P.M. or as soon thereafter as counsel can be heard, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure dismissing Counts II, IV, and VI of plaintiffs' Complaint against defendants and third-party plaintiffs, and for such other and further relief as may be just and proper.

Dated: New York, New York
January 14, 1977

DANIEL R. MURDOCK
Acting United States Attorney for
the Southern District of New York.
Attorney for the United States.

By: /s/
WILLIAM G. BALLAINE
Assistant United States Attorney
Office & Post Office Address:
One St. Andrews Plaza
New York, New York 10007
Tel.: (212) 791-0054

TO:

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NESSEN, KAMIN & SOLL
919 Third Avenue
New York, New York 10022

Attorneys for Plaintiffs

GILBERT, SEGALL & YOUNG
430 Park Avenue
New York, New York 10022

Attorneys for Plaintiff
Delta Air Lines, Inc.

DAVIS, POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005

Attorneys for Defendants &
Third-Party Plaintiffs.

THIRD-PARTY DEFENDANT'S STATEMENT PURSUANT TO GENERAL RULE 9(g)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----------------------------------x

DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

-against-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Third-Party Defendant.

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STATEMENT PURSUANT TO GENERAL RULE 9(g)

73 Civ. 2447 (EW)

Pursuant to Rule 9(g) of the General Rules of this Court, third-Party Defendant, the United States of America, submits this statement of material facts as to which it contends there is no genuine issue to be tried:

1. The taxpayers with respect to the Federal communications excise taxes involved in the present action are the members of the plaintiff class. The defendant operating companies collected such taxes and paid them over to the United States of America. [Defendants' Rule 9(g) Statement, dated December 17, 1976 and Plaintiffs' response thereto.]

2. In the present case claims for refund have been filed with the Internal Revenue Service by only some members of plaintiff claim and no tax refund suit has been commenced against the United States. [Defendants' Rule 9(g) Statement, dated December 17, 1976 and Plaintiffs' response thereto; Answers and Objections to Third-Party Defendant's Interrogatories of Plaintiffs, no. 1].

WGB:lm

Dated: New York, New York

January 14, 1977.

DANIEL R. MURDOCK
Acting United States Attorney
for the Southern District of
New York
Attorney for United States.

By: /s/
WILLIAM G. BALLAINE
Assistant United States Attorney
Office & Post Office Address:
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TO:

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1 Chase Manhattan Plaza
New York, New York 10005

Attorneys for Defendants &
Third-Party Plaintiffs.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----------------------------x
:
DUPONT GLORE FORGAN, INC., :
:
Plaintiff, :
:
v. : 73 Civ 2447
:
AMERICAN TELEPHONE & :
TELEGRAPH CORP., etc., :
:
Defendants. :
:
-----------------------------x

New York, New York
January 25, 1977 - 3 p.m.

BEFORE:

HON. EDWARD WEINFELD,

District Judge

APPEARANCES:

EUGENE H. NICKERSON, ESQ.
Attorney for Plaintiff

DAVIS, POLK & WARDWELL, ESQS.
Attorneys for Defendant
BY: GUY STRUVE, ESQ.,
of Counsel

ROBERT B. FISKE, ESQ.,
United States Attorney for the
Southern District of New York
BY: WILLIAM G. BALLAINE, ESQ.
Assistant United States Attorney

mbjl

MR. BALLAINE: My name is William G. Ballaine. I am representing the United States, which is a third party defendant in this action. We have made two motions, one to dismiss counts 2, 4 and 6 of the plaintiff's complaint asserting various claims for refunds of federal taxes allegedly--

THE COURT: Do you have standing to dismiss the plaintiff's complaints since you are a third-party defendant?

MR. BALLAINE: I believe I do, your Honor. I believe a third-party defendant may make a claim as respects any of the pleadings, and as a sequelae of that, we can make a substantive motion on jurisdictional grounds, even after the close of the pleadings themselves.

THE COURT: Go ahead.

MR. BALLAINE: I hope that is true.

THE COURT: Are you sure of it?

MR. BALLAINE: Yes, I am, your Honor.

THE COURT: I could understand your motion with respect to the third-party plaintiff, but I wonder how you got into the act as far as the plaintiff was concerned, and its claims with respect to the defendant or the plaintiff itself has made no note of that.

MR. BALLAINE: If I am not mistaken, your Honor, as a third-party defendant I would have been entitled to file a pleading in response.

THE COURT: In other words, if the complaint against the defendant is dismissed, naturally you are out of the case, at least you think you are.

MR. BALLAINE: I think I am. In fact, technically defendants have asserted over all six counts, so really even getting counts two, four and six gets me halfway home, but I do think I get all the way home by the time I am through. In any event, I must say that by and large my motion vis-a-vis the plaintiff's counter 2, 4 and 6 pretty much fall in along step with the arguments that the defendants have made. The only additional--

THE COURT: I think you triggered defendant's motion as against the plaintiff's complaint.

MR. BALLAINE: There is no question about that, your Honor. The only additional nuance that I offer to the defendants' motion is to view the United States as an indispensable party to the plaintiff's counts 2, 4 and 6, and I think that is correct because what the United States--

THE COURT: More than an indispensable party, you claim that you are really the only party that should be sued by the plaintiff for what you term a refund.

MR. BALLAINE: That is precisely correct, your Honor. The indispensable party is really just turning the ball over to look at it from the other side. It's essentially the same argument, if you prevail we are going to have to repay the taxes, then you can call us the indispensable party or the real party in interest, but the case has to be prosecuted against us and in accordance with the various very strict administrative refund requirements.

If your Honor likes, I would be delighted to go through both phases of my motion. If you prefer, I can simply go through the phase vis-a-vis the defendants.

THE COURT: Whichever you prefer. Whatever argument you are prepared to make .

MR. BALLAINE: I think they have to be considered as a unit, simply because the defendants have a cry of unfairness that has a sound, good sound to it, unless the United States makes clear that we believe the plaintiffs simply cannot bring a private action against the defendants, and it is because of that that we have no difficulty saying the defendants in turn simply cannot bring a third party action against us for the refund of taxes that are in issue.

THE COURT: Your broad position is any claim for refund must be against the government, and no other party?

MR. BALLAINE: Exactly.

THE COURT: And that the party who is the collector for the government is not the one to be sued?

MR. BALLAINE: Exactly, your Honor, and the plaintiffs rely on 6515C. We have found no case law which suggests that is correct. We have found nothing in the litigative history of that provision which suggests it is correct. On the contrary, everything goes the other way. If there is going to be any proper administration of our revenue laws, it has to be in accordance with our administrative procedures. Yet essentially what the plaintiffs claim it is right to [illegible] those procedures entirely by looking to 6415C. If you look at 6415C, your Honor, you will see that what that provision is doing is setting up a simple mechanism which ensures that any time the collector of a tax is entitled to a refund or a credit, he must pass it back on to the taxpayer who originally paid for it, and that really is all C is trying to get at; that subsection of 6415.

And we really cannot find a single thing which suggest that it means any more than that, and on the contrary, 7422A of the Internal Revenue Code suggests quite the contrary, that any refund suit must be against the United States. It is bald. And we simply cannot see how your Honor could possibly construe 6415 to give a private right of action unless at a minimum there were some clear congressional intent to do that. There is not a thing. There is not a thing.

THE COURT: You have no doubt, according to your argument, that the claim here is for a tax refund even though the plaintiff takes the position that there was a separate charge, and in effect, that the defendant had no right to make the payment or bill the tax and collect the tax and make a payment to the government?

MR. BALLAINE: That is correct. In essence why we say it is a tax refund is because the plaintiff's claim is predicated on their interpretation of what taxes are due and owing under the Internal Revenue Law, pure and simple. And their claim is in the nature of restitution. That is a tax refund case.

THE COURT: All right.

MR. BALLAINE: Vis-a-vis our--excuse me, our motion vis-a-vis the defendants then I will go into briefly. The first part of it is essentially that defendants cannot sue us over for any refund that they may owe the plaintiffs by reason of the counts 2, 4 and 6. The simple answer, of course, is that 2, 4 and 6 cannot be prosecuted against the defendants. Turning the ball over, I have also argued that in fact under 6415 the collector, the defendant, is entitled under certain circumstances to bring a refund suit against the United States, but they have to file administrative claim forms and they have to show that they have either repaid the tax--

THE COURT: Or had the consent.

MR. BALLAINE: Exactly, your Honor, and that fits nicely with our view of--

THE COURT: How about their argument that the bringing of the action by the plaintiff in effect is a consent?

MR. BALLAINE: I must say, as a legal matter I do not believe that that could possibly be a proper construction of 6415, not when the plaintiffs, in answer to the government's interrogatories, which I embodied in the 9g, say "We did not consent, we have not given consent. In fact, we have our own refund claims that are outstanding against the government, although we are not pressing those particular administrative refund claims in this suit."

I really feel as a matter of law that that can not be consent. But in saying that, again, I have to fall back and say the plaintiffs cannot be suing the defendants at all, and that is why my construction of this consent word in 6415B, I think, requires agreement by, or suggests agreement by your Honor.

Essentially what is at the bottom of all this, as far as the defendants are concerned, is that they put in an administrative form, the IRS cannot give a refund on the basis of the form because they have not met all the requirements. If the IRS said, "All right, for the moment--

THE COURT: You say they failed to pay the taxes back to the plaintiff and/or they have not obtained the consent of the plaintiff?

MR. BALLAINE: Not only didn't they say it, they could not say it. It was not true. The IRS, by statute, could not possibly give them a refund. Moreover, even if the IRS said, "Let's be practical, we'll at least examine the underlying merits," they couldn't do it because the defendants don't know what the underlying merits are. They are revising the underlying merits. There is absolutely nothing that the IRS could do except nothing, which is what happened in this case, or a rejection of the administrative claims filed by the defendants.

The IRS chose to do nothing and I think in those circumstances, it cannot be possible that the defendants can walk into Federal District Court. They simply have not given any substance to the administrative procedures which are the underpinnings of a tax refund suit.

THE COURT: What about the plaintiff's position that since this motion is made on what they call the eve of trial, that this issue should go over and perhaps there will be some clarification at the time of the trial, as long as we are going to have a trial with respect to the remaining counts?

MR. BALLAINE: That is a very convenient argument. The fact of the matter is on behalf of the government I have delayed making my motion this late--

THE COURT: Why did you delay?

MR. BALLAINE: Precisely because my understanding is that your Honor was very clear that you wanted full discovery on all aspects of this case, and the full discovery has been had.

THE COURT: There is more than full discovery in this case. I said the parties had really descended to a war of attrition, if I remember correctly.

MR. BALLAINE: Well, I didn't want to step into the middle of that, and I allowed discovery to be finished. There was little or nothing done vis-a-vis the United States, almost nothing, and now I think is exactly the proper time, because if my motions are granted, obviously the United States is out. We don't belong in. We don't belong in as a party, we should not be held liable.

THE COURT: Wouldn't you like to sit in on this case?

MR. BALLAINE: I would love to sit in as a spectator only and I am hoping your Honor will allow me in on that basis only.

Let me turn, if I may, to the other facet of this case, and it does not require much attention. I am not even going to speak to the statute of limitations argument because I really think that is subordinate. I think the statute of limitations is governing the timely filing of administrative claim really must reply to the defendants' regardless of whether they are a "taxpayer" or the "collector" because if they are going to bring a refund suit they have to be deemed a taxpayer for purposes of commencing a suit in federal court against the United States.

In any event, that really is subordinate to our primary claim that there is no claim-over for refund of taxes against the U.S.

The other facet of my argument is defendants has apparently tried to allege jurisdiction under 1346B, saying this is in the nature of a tort. I assume that thrust is going mostly to counts 1, 3 and 5 of plaintiff's complaint, because the third party complaint does try to hold us liable over aspects those counts as well, and as your Honor knows, 1, 3 and 5 really are in the nature of tortious claims about what the defendants should have done rather than what they did with respect to the collection of federal excise taxes.

It strikes me aspects that that claim-over and the jurisdictional predicate, that it has to be covered by 2680C of the Tort Claims Act, which specifically excludes any claim, tortious claim arising out of the assessment or collection of federal taxes.

The defendants would like to say, "Well, we don't know what is going to happen at trial, we don't know what the claim is going to be."

I suggest you can always look at the pleadings and know what the parameters are, that when you look at the pleadings you have got to conclude that if we are going to be liable under any theory it is because we obtained tax monies from the defendants; i.e., our tortious conduct arose in respect of the collection of taxes.

I have cited three cases to your Honor. All three cases are on motions to dismiss. None of them are after a full trial on the merits. The pleadings can properly control and I must say, in my rule 9g, I tried to state very broadly what the basis--what their underlying facts were that defendants were alleging in support of their claimed jurisdiction under 1346B.

I quoted the very answers that defendants gave in the interrogatories. Defendants are very imaginative. They gave broad answers, and yet, when it came time for them to respond to my 9g they did not feel comfortable enough to simply allow that allegation to stand, and they felt obliged to add, "Well, we don't know it's going to happen, so you ought to wait until trial."

I don't think you need to, your Honor, because the pleadings of the plaintiff really do control, and under no circumstances could there possibly be a tort claim-over against the United States.

Thank you.

MR. STRUVE: May it please the Court, my name is Guy Struve. I am with Davis, Polk and Wardwell, and I represent the defendants and third-party plaintiffs. If I may, I would like first to address the merits of defendants' motion for partial summary judgment against the plaintiffs because that is the underlying motion here, and if decided in defendants' favor, it moots almost all of the issues.

THE COURT: You join with the government, don't you, on that branch of the motion?

MR. STRUVE: We are in agreement with the government on that branch of the motion.

Your Honor, there are a number of facts which your Honor can take as conceded because they are conceded by all parties. First, counts 2, 4 and 6 of the complaint are concededly claims to recover alleged illegal or erroneous collections of federal excise taxes.

mbjl

Second, it is conceded by all parties, in answer to our requests for admissions, that every penny of the taxes in question was paid over timely by defendants to the United States of America.

Third, the plaintiffs concede that before bringing a tax refund claim like counts 2, 4, and 6 against the United States, they would have to file a claim for refund with the Internal Revenue Service. And it is common ground, moreover, that that claim for refund would have to be an individual claim filed by and on behalf of each individual plaintiff. Not just by and on behalf of the named plaintiffs.

Finally, it is common ground that to be timely, those refund claims would have to be filed with the Internal Revenue Service within the three year limitations period prescribed by Section 6511(a) of the Internal Revenue Code. On that last point I have a citation, page 18 of the plaintiffs' brief on our motion.

THE COURT: Talking about your briefs, can you submit to the Court a copy of that unreported decision you referred to in the Agron case?

MR. STRUVE: Yes, your Honor, I have a copy of that which I would be glad to make available to the Court and also copies for the other parties.

Plaintiffs' basic contention on counts 2, 4 and 6 is that they can avoid all of the requirements that I have just enumerated, which admittedly apply if they sue the United States, by suing the defendants instead. And the plaintiffs acknowledge, because they have to, that the result of that would be either that the defendants could then claim over against the United States, so that the plaintiffs would have gone the back way around the jurisdictional requirements of the code, or that the defendants, who admittedly paid every penny of the tax to the United States, would be left without recourse.

THE COURT: What was the procedure? You billed the plaintiffs for these taxes, did you not, and in turn collected the taxes from the plaintiffs and then turned it over to the government?

MR. STRUVE: That is correct.

THE COURT: Their claim is that your books have been set up on a separate billing basis and you had no right to bill them for any taxes.

MR. STRUVE: The plaintiff's brief is quite misleading on that point because they have admitted that there were no separate charges in our books and records.

THE COURT: I don't understand they admit that at all. The clear thrust of the even numbered counts 2, 4 and 6 is that your records were set up on a separate billing basis and that you improperly charged them the taxes which you collected and then turned over to the government.

MR. STRUVE: But in answer to request 16 of our recent requests to admit the plaintiffs as well as the government have admitted that in fact there was no separate charge in our books and records. The sole contention the plaintiffs are left with is that the Court can look to the tariff charge specified in the defendants' public tariffs for a different service, namely, a restricted Centrex station, and call that the separate charge for the private portion of the unrestricted Centrex station.

I think that that is wrong on the merits, but the point of importance to your Honor here is that their sole contention on the separate charge point now rests upon something that was apparent in public tariffs from the first day of the relevant period. There is no contention left in the case that there was something hidden in the defendants' books and records that the plaintiffs could not know about.

Now, plaintiffs base their claim--if the Court likes, I can hand up for the Court's convenience a copy of the plaintiff's answers to our requests to admit.

THE COURT: You have included those, have you not? You made a reference to them previously.

MR. STRUVE: My understanding was that they had been filed with the Court. I have an extra copy here.

THE COURT: All right, we will take it.

(Paper handed to the Court.)

MR. STRUVE: My reference was to number 16, which appears on page 8.

Plaintiffs argue that they can maintain this action against the private collector rather than against the United States because of subsection (c) of section 6415 of the Code. Now, section 6415 is a very specialized provision of the Code. It applies to two and only two of the multitude of federal taxes. The only two taxes it applies to are the Federal excise taxes on air transportation and communications.

The plaintiffs have not suggested any reason why congress should have wanted to single out these two taxes and these two alone as being taxes where a refund suit could be brought against the collector rather than against the United States, nor have they pointed to any legislative history to show that either congress or the Internal Revenue Service ever intend[illegible] a result. To the contrary, we cite to the Court the regulations which the Internal Revenue Service put out in 1932 when the current communications tax was first enacted. Those regulations make it clear that the taxpayer is only supposed to apply to the collector for a refund in the case of a conceded overcollection, a mechanical or arithmetical error, and that in cases where there was a dispute as to the collectability of the tax, the procedure was the same as that to be followed with respect to all other federal taxes, namely, to file a refund claim with the Internal Revenue Service, and to bring any ensuing refund suit against the United States.

THE COURT: Where do you get this reference to the arithmetical or mechanical error?

MR. STRUVE: From the words of the 1932 --

THE COURT: There is nothing in the statute about that, is there?

MR. STRUVE: No, but the words of the 1932 regulation make that clear. The statutes up to and through the 1939 Code bracketed together what are now subsections (b) and (c) of Section 6415. (b) is the one that talks about the collector taking a credit on a return. (c) is the one that talks about refunding to the taxpayer. And as Mr. Ballaine says, that bracketing, taken together with the regulations which I have cited to your Honor, makes it clear that the purpose of that is to make it clear that where that credit was allowed to the collector because of, and here it is not words I have made up, it comes straight from the 1932 regulations, arithmetical or mechanical error, that in turn was to be refunded to the taxpayer.

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In all other cases, and this is straight from the words of the 1932 regulations, the procedure to be followed by the taxpayer was to file a claim for refund with the Internal Revenue Service, and every time this question has come up, and as your Honor knows, it has come up before, the Internal Revenue Service has taken precisely the position that I have outlined, and has often itself in court said this action should not have been brought against the private collector, it should have been brought against the United States. And in each case, the court has sustained that interpretation: in the Agron case, both the unreported decision I have handed up to your Honor and the later reported decision, in the Rose against American Airlines case, which also dealt with 6415, because it was an air transportation taxpayer, and in the Econ case. Plaintiffs have tried to distinguish those decisions on various grounds, but as we have shown in our reply brief, the distinctions are contrary to fact.

Finally, and this it seems to me is a crucial point, we rely on the terms of Section 7422 (f) (1) of the Internal Revenue Code. That section says where you have a suit or proceeding to recover federal taxes alleged to have been erroneously or illegally collected, that suit or proceeding may be brought only against the United States and not against any officer or employee of the United states.

THE COURT: Do you know of any instance where a direct suit was permitted by taxpayer against a private collector?

MR. STRUVE: No, we know of no such case. Every case where, to our knowledge, that has been tried is cited in our brief and they all come out the same way, namely, the courts have held that you cannot bring the action that way. You have to comply with the jurisdictional requirements of the Code.

Let me now turn, your Honor, to the government's motion to dismiss the third-party complaint. Virtually all of the government's motion is directed to the third-party complaint insofar as it is based upon counts 2, 4 and 6, the counts for refund in plaintiffs' complaint. Obviously, if your Honor dismisses 2, 4 and 6 of the complaint, those issues become moot, and defendants submit that that is what the court should do. If, however, for any reason counts 2, 4 and 6 are not dismissed, then the defendants submit that in the interests of justice and avoidance of inconsistent results and duplicative litigation, the United States should remain a party through the trial of the action.

The government's two points on tax refund--

THE COURT: That is a somewhat inconsistent position you are taking, it is not?

MR. STRUVE: We are forced to, your Honor. We are forced to. On our motion, the plaintiffs have sued us with what we claim is a purple cow, a kind of action that cannot be brought. In order to protect our clients' interests we were forced to serve a third-party complaint on the United States. Then the United States moved to dismiss the third-party complaint pointing out quite rightly that the original action was a purple cow. Obviously, that is true. Our position, therefore, is consistent. We say that the plaintiff's claim should not be sustained, but if for any reason it survives this stage of the case, then the government should likewise stay in the case.

There is also another essential difference between the government's motion to dismiss the third-party complaint and the motion that we are making to dismiss counts 2, 4 and 6. That rests on the fact that we are a collector, we are not the taxpayer. Our position is of the stakeholder in the middle.

THE COURT: You say you are caught in the middle really.

MR. STRUVE: In the middle.

THE COURT: Plaintiff says you are caught in the middle because of your own fault.

MR. STRUVE: That is a claim, your Honor, which can be made in any case where there is a dispute as to collectability, and there are many such disputes every time we deal with the Internal Revenue Code. If the private collector could be put in the middle of every one of these disputes, not only would there be administrative chaos for the government, but the result would often be a highly unjust one for the private party.

THE COURT: Mr. Struve, if the government should prevail on counts 2, 4 and 6, is there any reason why your complaint against the government under the other counts should not fall? What is the theory on which you seek to hold the government on the other counts?

MR. STRUVE: The theory, very simply, rests on the fact that all of these taxes were paid to the government; that if there was any statutory mandate or any duty arising from the telephone companies' status as tax collectors to separate the charges, the government was just as aware of the fact on which that was based as we were, and therefore, whatever whatever such duty may be, the government and not the defendant should bear the ultimate burden.

THE COURT: The odd numbered counts proceed on an entirely different theory. There you are charged with in effect a conspiracy. In fact, are you claiming the government was a co-conspirator with you? I don't understand how

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you can hold the government under the odd numbered counts. You explain that to me.

MR. STRUVE: Your Honor, what we have said in this connection--

THE COURT: I understand your position. With respect to the even numbered counts you say you collected it and turned it over to the government and the plaintiff is suing you, and they say, having turned it over to the government, we have a claim against the government. What is your position with respect to the odd numbered counts?

MR. STRUVE: I have explained the factual basis for it, your Honor. We are not prepared to formulate it more definitely until we know what the plaintiffs' theory is going to be against us. It is true as Mr. Ballaine says that we knew what was in the complaint when it was filed years ago. The plaintiff's claims have changed a lot since then.

What comes out at the trial, both legal and factual, may well be an entirely different thing from what is in the complaint. What we are trying to say to your Honor is that obviously we would not have filed a third-party complaint had the complaint been limited to the odd numbered counts, and we did not include the anti-trust charges in the third-party complaint because our view is those will fall of themselves. These do not, in any event, involve the

United States, but since we were bringing the third-party complaint --

THE COURT: As long as you were in the act, you might as well bring them in on all counts. I have difficulty understanding your theory with respect to the odd numbered counts. As I say, I do understand it with respect to the even numbered counts, but in the odd numbers counts you are charged with unlawful conduct in effect. To hold the government under your third-party complaint under the odd numbered counts, you would have frank statement, and said, as long as you were alleging claims you were going to assert the claims under all counts.

MR. STRUVE: I don't want to take too much of your Honor's time to reargue it, but I should reemphasize what I tried to state clearly before, that to the extent that the plaintiffs' claim is that the 1965 act contained a mandate which was there for all to read, and to the extent that the plaintiffs' claim is that as collectors our duty arising from the Internal Revenue Code required us to make this separation, the operative facts that required that were as obvious to the United States as they were to us.

Thank you.

MR. NICKERSON: May it please the Court, in order to make my point, I think I have to go back and fill in a little of the facts that we intend to prove, because it is our position here that the defendants were not innocent collectors who in the course of their duties as collectors collected tax and turned it over to the government. On the contrary, our contention is that they abused the collection process, that they collected taxes knowing that there were entries on their books which satisfied the statute as a separate charge, and nonetheless collected those taxes, turned them over to the government, and got the use of the float and turned them over, moreover, because they had a particular motive for doing it which would advance their own economic interest.

THE COURT: Whatever reason there was for collecting these taxes, you say, and that is what I tried to ask your adversary before, your contention is that there was a separate charge and they should not have collected the taxes.

MR.NICKERSON: But it goes further.

THE COURT: But the fact is they did, and they turned it over to the government and aren't you seeking the refund of the taxes that had been paid to the government under what you claim was an illegal collection of a tax?

MR. NICKERSON: Yes, your Honor, but I think I have to prove more than that in order to collect on these counts. I think I have to prove that there was no probable cause for them to have collected these taxes.

Let me just give you a little of the background, and I can put some meat on those bones.

You will recall from perhaps the previous motions that there was a service called PBX which meant that you could dial intercommunicating and you could dial out to get the general telephone exchange.

There were also, we discovered in the course of the discovery processes, that with that PBX service was two capabilities in some states, but in very few, which gave the capability of direct in dialing, and identified outward dialing, direct in dialing to the individual stations, and under identification of those stations that made toll calls out, for example.

In 1961 AT&T decided that they would extend this direct in dialing and identified outward dialing and extend that over the entire nation, and they would call it Centrex. Now, the service was precisely the same as what was rendered with PBX, with direct in dialing and identified outward dialing. The only difference was in the manner of charge. In PBX, the charges were made on the basis of the equipment that was there to render the service, the switching equipment that enabled you to get intercommunication at a separate charge from the trunk lines that gave you exchange access.

And in Centrex, there was a bundled rate, so that it was all one place on the station rate. Furthermore, and this is important, your Honor, for this case and on this basis they decided that they would render it in two modes. One would be Centrex CU, which meant that the switching equipment that gave intercommunicating capability was on the customer's premises. The other was Centrex Co, which meant that the switching equipment was on the premises of the telephone company.

Now, CU was much cheaper for the phone company to render, had cheaper costs, and it was an inferior service. It did not have the same capabilities or the same flexibility as Centrex CO, but instead of offering two separate services which the customer could choose between, they decided, "We will average these costs, we will make a competitive rate, and we, the phone companies, will retain in our own hands the determination of whether we are going to give that service by CU or CO."

So, the effect was that CU subsidized CO, and there are indications in the documents that they recognized that that could make the Centrex rate structure vulnerable to regulatory commission criticism. Furthermore, you remember that the PBX services with direct inward dialing and identified outward dialing was the same service as Centrex, but when they went to file the Centrex rates by just putting that central label on it, they decided they would get an increase in their rates. So, again, that made it vulnerable to regulatory criticism because they were discriminating between PBX and Centrex customers.

Now, that was the situation that they were faced with in 1965 when the Excise Tax Reduction Act was passed. These rates, in effect, prior communication provided there was a separate rate charge, would be exempt from tax, but as far as the customers were concerned, there was no separate charge. So AT&T said to itself, "If we treat this as a separate charge, or if we go and unbundle these rates, that will draw the customer's attention to the whole question of Centrex rates. They amay attack them."

THE COURT: Mr. Nickerson, that is going into the merits of your argument, but the basic question is, aren't you really suing for a refund, no matter on what basis the defendants made a billing charge to you?

MR. NICKERSON: Yes.

THE COURT: You say there was no probable cause of any kind?

MR. NICKERSON: Yes.

THE COURT: They billed you, collected the taxes, and turned it over to the government, and you are seeking to recover the taxes that were collected from you and paid to the government.

MR. NICKERSON: Yes, your Honor.

THE COURT: And their position is, as is the government's position, that any such suit must be brought against the government, and not against the collector in this case.

MR. NICKERSON: Yes.

THE COURT: Suppose you went into a store today here in the City of New York and you made a purchase and the vendor said, "You owe a tax on this, we know there is a tax due on that." Say it is an item of food. He has no problem about the basis for the tax. How is that different?

MR. NICKERSON: I think it is different. Let me explain why. We have to assume on this motion, your Honor, that there are sufficient entries on the books of the telephone company to make this a separate charge, so that it qualifies for the tax exemption. Secondly, we have to assume, your Honor, that the defendants knew that fact, but nonetheless deliberately and for their own purposes, namely to not only get the float but also to prote~~s~~ct those rates from attack, that they stated that they were going to collect the tax in any event.

We say 6415 says, and it is an unqualified direction, that someone who collects a tax and overcollects it must--this is on page 7 of my brief--shall refund such overcollection to the person entitled thereto.

They say that does not mean what it says, but it should have said refund an overcollection provided it is an overcollection or provided that it is due to a mechanical or clerical error. There is nothing of that in the legislative history or in the language of the statute. Similarly, section 742F1, the one where they say that you can bring an overcollection suit against the United States, and not an officer or an employee of the United States, that was solely directed to making folks bring their suit against the United States rather than the Internal Revenue District Director, because they were finding that those suits were in the districts, were all being collected in the district where those people lived.

Let me get to the heart of it, though, your Honor. I think that the argument that Mr. Ballaine has made, namely that if you constru~~ct~~e 6415 to mean that every time that you have an overcollection, that you can go around the prerequisites, you don't have to file a claim for a refund, you can bring a class action. I think there is considerable force to that in an ordinary overcollection case. But this is not an ordinalry overcollection case. This is a case where knowing, your Honor, that these entries were on the books, which we have to assume, and which we will show at the trial, and which we are entitled to show at the trial, satisfied the statue as a separate charge. Nevertheless, they went ahead and collected the tax,and their motive is important. It is important, and if you look, your Honor, I think it is 28USC section 2006, which is quoted in full in defendant's brief in opposition to the government's motion. It says you cannot collect a judgment against a collector who has in the performance of his duties collected it and paid it over to the treasury provided--provided--probable cause existed, and if probable cause existed, then it will be paid out of the treasury.

The clear implication from that, your Honor, is that if there is no probable cause, that we are in 6415, at least it gives us a cause of action where there is no probable cause for the defendants to collect from us.

THE COURT: Have you come across any case where a suit was permitted against the private collector?

MR. NICKERSON: I have not.

THE COURT: We have not either.

MR. NICKERSON: No, I have not, but I--

THE COURT: Is that of any significance at all?

MR. NICKERSON: I don't think so, because I think there are very few cases, your Honor, where there is no probable cause, and I think it ought not to be cuttoff summarily on summary judgment until I get a chance to prove that they did not have probable cause.

THE COURT: Well, you have had ample chance in this very extensive discovery process.

MR. NICKERSON: I mean on the trial, your Honor. I think there is sufficient in the documents to satisfy--

THE COURT: What more can you add on a trial that you have not added on this motion?

MR. NICKERSON: I think I am entitled to prove, A, that the separate rate charge existed; B, that they knew it, that a separate rate charge existed, and despite the fact that they knew it they went ahead and collected it anyway.

So that therefore they collected taxes that they knew were not true, and your Honor, I might add that that means I don't think they have a claim against the government. The implication of 2006 mainly is that they don't have a claim against the government, because the only time that they have a claim-over against the government is when they collect it with probable cause, but as between the innocent customer and the defendant who collected taxes for his own purposes, and to advance his own economic interests--

THE COURT: When you say his own purposes, that is not altogether accurate. They collected the taxes and turned it over to the government.

MR. NICKERSON: What I am saying is that their motivation was important once you say probable cause--

THE COURT: I asked you that the other day when the matter of expert witnesses came up, how you get to psychoanalyzing a corporate purpose, and you seemed to have the idea that motivation is a very dominant factor here.

MR. NICKERSON: I do, sir, when it says probable cause because probable cause means what is in the mind of whoever is taking the action. That is what probable cause means, and I briefed their intent, your Honor, through their own documents. That is what I will prove.

THE COURT: Your position is that the motion by the defendant directed against the plaintiff to dismiss counts 2, 4 and 6 should be denied, and although you are not very much involved in it, you say that likewise if the government's motion for partial summary judgment against the defendant as a third-party plaintiff should be granted, that the government ought to be out of the case.

MR. NICKERSON: I think, to be consistent, you have to do that because otherwise--

THE COURT: Do you think there is a virtue in consistency here?

MR. NICKERSON: I think so because I would like to make sense of the statutory scheme, and I think that does make sense, and if I claimed otherwise I would simply be circumventing, as Mr. Ballaine says. I would simply be circumventing the prerequisites to a claim against the government, so I think my own judgment is that they don't have a claim-over against the government, but having done it without probable cause, we have a claim against them.

THE COURT: Basically, your claim is that the defendant deliberately billed for it and were aware of the fact that they should not have billed you for the tax?

MR. NICKERSON: Correct.

THE COURT: And this in effect is a separate type of tortious conduct and the government has nothing to do with it, and it is only incidental that what you are seeking is the amount of the taxes they collected?

MR. NICKERSON: I added to that, your Honor, that 6415C at least gives me that cause of action.

THE COURT: All right. Mr. Ballaine, I have to ask you a question. I had a note here before. Look at your brief on page 32. I think there is an error. Did you mean what you say there?

MR. BALLAINE: I frequently don't, your Honor.

THE COURT: Maybe it is just a typo. Defendants state that the tortious conduct complained of consists of the alleged fact that the United States received and retained all Federal Communications Excise Taxes, remitted by the operating companies, with the awareness that the Centrex did not contain separate rate Centrex station charges. Didn't you mean did contain?

MR. BALLAIN: I am sorry.

THE COURT: That word does not belong in there?

MR. BALLAINE: No, it does not. I am sorry. The rule 9g does control because I was intending to incorporate that.

THE COURT: All right.

I will take the papers.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DUPONT GLORE FORGAN INCORPORATED, et al., :

Plaintiffs, : 73 Civ. 2447 (EW)

-against-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., :

Defendants and Third-Party Plaintiffs, : PRE-TRIAL ORDER

-against-

UNITED STATES OF AMERICA, :

Third-Party Defendant. :

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Pursuant to the direction of the Court made on January 21, 1977 and of the Honorable Sol Schreiber, United States Magistrate, made on February 8, 1977, the parties by their respective counsel have prepared and submitted this Pre-Trial Order.

I. Jurisdiction

Plaintiffs claim that this Court has jurisdiction over the subject matter of the Complaint by virtue of Section 4 of the Clayton Act, 15 U.S.C. § 15, and of 28 U.S.C. §§ 1331 and 1337. Defendants and third-party plaintiffs ("defendants") deny that plaintiffs have stated a claim or claims sufficient to confer subject matter jurisdiction upon the Court.

Defendants claim that this Court has jurisdiction over the subject matter of the Third-Party Complaint pursuant to 28 U.S.C. §§ 1340, 1346(a), 1346(b), and the principle of ancillary jurisdiction.

The third-party defendant denies that the defendants have stated a claim or claims sufficient to confer subject matter jurisdiction upon the Court.

II. Amendment of Pleadings

Except as expressly stated in Appendices A and D hereto, all pleadings shall be deemed amended to conform to the issues and factual contentions specified by the respective parties in Appendices A-D hereto.

III. Appendices

Attached as Appendices to this Order and made a part hereof are the following:

Appendix A - Statement of Issues for Determination

Appendix B - Plaintiffs' Factual Contentions

Appendix C - Defendants' Factual Contentions

Appendix D - Third-Party Defendant's Factual Contentions

Appendix E - Plaintiffs' List of Trial Exhibits with Defendants' and Third-Party Defendant's Objections Thereto

Appendix F - Defendants' List of Trial Exhibits with Plaintiffs' and Third-Party Defendant's Objections Thereto

Appendix G - Third-Party Defendant's List of Trial Exhibits with Plaintiffs' and Defendants' Objections Thereto

Appendix H - Depositions to be Offered in Evidence by Plaintiffs

Appendix I - Depositions to be Offered in Evidence by Defendants

Appendix - Depositions to be Offered in Evidence by Third-Party Defendant

Appendix K - Plaintiffs' List of Prospective Trial Witnesses

Appendix L - Defendants' List of Prospective Trial Witnesses

Appendix M - Third-Party Defendant's List of Prospective Trial Witnesses

IV. Limitation and Reservations

Except as hereinafter provided, no party may offer in evidence any document not listed in its respective list of trial exhibits, read any portion of a deposition not listed in Appendices H, I, or J hereof, or call any witness who is not listed on its respective witness list annexed hereto. There is reserved to each party the right to supplement its list of witnesses, exhibits, or depositions upon notice and application to the Court with a showing of good cause for not having previously listed such witnesses, exhibits, or portions of depositions.

Objections to the receipt of any exhibit in evidence (other than objections on the ground of lack of relevance) shall be limited to such objections as are listed in Appendix E, F, or G.

The limitation herein contained shall not foreclose any party from utilizing any documents or depositions for purposes of impeachment.

V. Use of Documents

Legible copies of documents included in the attached lists of trial exhibits may be offered in evidence in lieu of the originals with the same force and effect that the originals would have.

VI. Use of Depositions

Except as to the depositions of Robert M. Kemp and Robert D. Weber, plaintiffs may offer depositions in lieu of live testimony as to any of the witnesses in Appendix H, and defendants and third-party defendant will not assert the objection that any such witness is or may be available to give live testimony. All other objections (including as to form by the third-party defendant) to the reading of any deposition or portion thereof are reserved for trial. Plaintiffs reserve the right in proving their prima facie case to read those parts of the depositions of Robert M. Kemp and Robert D. Weber referred to in Appendix H, and defendants and third-party defendant reserve the right, pursuant to Rule 32(a)(4) of the Federal Rules of Civil Procedure, to introduce or to require plaintiffs to introduce any other parts of such depositions.

VII. Agreed Facts

The parties stipulate to the facts in the Stipulation of Facts dated February 28, 1977 and to the facts in the Stipulation as to Documents dated February 28, 1977 for use in this trial only and all parties reserve their rights to object to the relevance of any such stipulated facts.

VIII. Trial

The case will be tried commencing at a date fixed ~~1977, at 10:00 A.M.~~ by the Court.

IX. Modification

This Pre-Trial Order may be modified at the trial of the action, or prior thereto, to prevent manifest injustice. Such modification may be made either on application of counsel or by the Court sua sponte.

Dated: New York, New York
February 28, 1977

s/Edward Weinfeld
U.S.D.J.

Counsel for the parties consent to the entry of the foregoing Order.

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APPENDIX A

Issues to Be Determined at Trial

I. Antitrust Claim (Counts VII and VIII)

A. Plaintiffs' Issues

1. Did the defendant operating companies enter into an express or implied agreement in 1961 or thereafter with defendant American Telephone and Telegraph Company (AT&T) and among themselves to maintain a uniform rate structure for Centrex service, including an agreement on some or all of the following fundamentals:

(a) a package charge for each unrestricted Centrex main station ("Centrex station") - without a separate charge for the use of each item of basic equipment - the necessary effect of which was to establish a single, package charge for the exchange access and intercommunication portions of Centrex service;

(b) a single Centrex offering treated essentially the same for rate purposes regardless of the type of switching equipment used to provide the service and regardless of the location of the switching equipment; and

(c). the reservation to the defendant operating company, rather than to the customer, of the choice of serving method (Centrex-CO or Centrex-CU)?

2. Did the defendant operating companies enter into an express or implied agreement in 1964-65 or thereafter with defendant AT&T and among themselves to maintain the package Centrex charge and not to separate Centrex station charges for exchange access and for intercommunication?

3. If there was an agreement among defendant AT&T, its twenty-one majority-owned subsidiaries, Cincinnati Bell, Inc. and Southern New England Telephone Company to maintain a uniform rate structure for Centrex service and not to separate Centrex station charges for exchange access and for intercommunication, did such agreement constitute a contract, combination or conspiracy in restraint of trade or commerce within the meaning of Section 1 of the Sherman Act, 15 U.S.C. § 1?

4. If there was an agreement among the defendants to maintain a uniform rate structure for Centrex service and not to separate Centrex station charges for exchange access and for intercommunication, did such agreement constitute a contract, combination or conspiracy to fix, maintain, peg or stabilize prices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1?

5 If the defendants violated Section 1 of the Sherman Act, 15 U.S.C. § 1, in the manner set forth in paragraph 3 or 4 above, were members of the plaintiff class injured in their business or property by reason of such violation within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15?

B. Defendants' Issues

6. Are the answers to paragraphs 1-5 above affected by the facts of the present case, including: (1) the fact that the charges of each of the defendant operating companies for Centrex service were subject to regulation by State and local regulatory authorities, and were set forth in tariffs which were filed with State or local regulatory authorities, which became effective pursuant to applicable State laws, and with which each defendant operating company complied in all respects; (2) the fact that no person at any time requested any State or local

regulatory authority to direct that the Centrex tariffs of any defendant operating company other than Northwestern Bell be amended to establish separate Centrex station charges for exchange access and for intercommunication, and that no such request was made with respect to the Centrex tariffs of Northwestern Bell until after Northwestern Bell had determined to file revised tariffs establishing such separate charges; (3) the fact that each of the defendant operating companies, within its service area, is the only telephone company which is authorized under the applicable State laws to render Centrex service; and (4) the relationships among AT&T and the defendant operating companies?

7. Is there any support in existing legal authorities for an affirmative answer to paragraphs 1-5 above, and, if not, should the defendants be held retrospectively liable for treble damages on the basis of the novel theories of antitrust liability set forth in paragraphs 1-5 above?

8. Is plaintiffs' antitrust claim barred in whole or in part by the statute of limitations of Section 4b of the Clayton Act, 15 U.S.C. § 15b, or by laches?

II. Breach of Duty Claim (Counts I, III and V)

A. Plaintiffs' Issues

9. Did the Federal Excise Tax Reduction Act of 1965 (the "Act") - when construed in the context of (1) Sections 4291, 6415, and 7501 of the Internal Revenue Code, 26 U.S.C. §§ 4291, 6415, and 7501, (2) Article I, Section 8 of the United States Constitution, (3) Sections 201 and 202 of the Federal Communications Act, 47 U.S.C. §§ 201, 202, (4) State statutes regulating telephone companies as public utilities, and (5) common law principles - impose upon the defendant operating

companies an obligation owed to members of the plaintiff class to establish separate Centrex station charges so as to provide a "separate charge" for "private communication service" within the meaning of Section 4252(d) of the Act?

10. If the answer to paragraph 9 is in the affirmative, did defendant operating companies violate such obligation?

11. If the answer to paragraph 10 is in the affirmative, did AT&T direct, aid, abet, or conspire with the defendant operating companies in so doing?

12. If the answer to paragraph 10 or 11 is in the affirmative, were members of the plaintiff class damaged by reason thereof?

B. Defendants' Issues

13. Are the answers to paragraphs 9-12 above affected by the facts of the present case, including: (1) the fact that the charges of each of the defendant operating companies for Centrex service were subject to regulation by State and local regulatory authorities, and were set forth in tariffs which were filed with State or local regulatory authorities, which became effective pursuant to applicable State laws, and with which each defendant operating company complied in all respects; (2) the fact that no person at any time requested any State or local regulatory authority to direct that the Centrex tariffs of any defendant operating company other than Northwestern Bell be amended to establish separate Centrex station charges for exchange access and for intercommunication, and that no such request was made with respect to the Centrex tariffs of Northwestern Bell until after Northwestern Bell had determined to file revised tariffs establishing such separate charges; (3) the fact that each of the defendant operating companies, within its service area, is the only telephone

company which is authorized under the applicable State laws to render Centrex service; and (4) the relationships among AT&T and the defendant operating companies?

14. Is there any support in existing legal authorities for an affirmative answer to paragraphs 9-12 above, and, if not, should the defendants be held retrospectively liable for damages on the basis of the novel theories of liability set forth in paragraphs 9-12 above?

15. Is plaintiffs' breach of duty claim barred in whole or in part by the statutes of limitations contained in 26 U.S.C. § 6511(a) and 47 U.S.C. § 415(b), (c), by such non-Federal statutes of limitations as may be "borrowed" by analogy to the Federal duty claimed by plaintiffs to be imposed by the Act, or by laches?

III. Overcollection Claim (Counts II, IV and VI)

A. Plaintiffs' Issues

16. Did the charge (if any) of each of the defendant operating companies for fully restricted Centrex stations constitute a "separate charge" for unrestricted Centrex service within the meaning of Section 4252(d) of the Act?

17. Did the defendant operating companies collect from members of the plaintiff class amounts calculated as taxes on the private communication component of unrestricted Centrex service without probable cause to believe that such amounts were due as taxes and did AT&T direct, aid, abet, or conspire with the defendant operating companies in so doing?

B. Defendants' and Third Party Defendant's Issues

18. May plaintiffs' overcollection claim be brought against the defendants, or must it be brought only against the United States?

19. Has each member of the plaintiff class filed timely refund claims with the Internal Revenue Service with respect to plaintiffs' overcollection claim?

20. Is plaintiffs' overcollection claim barred in whole or in part by the statute of limitations of 26 U.S.C. § 6511(a), or by laches?

IV. Standing

A. Defendants' Issue

21. May the three named plaintiffs, which were Centrex customers of only two of the defendant operating companies (New York Telephone Company and Southwestern Bell Telephone Company), recover damages on any of plaintiffs' claims against the other 21 defendant operating companies or against AT&T?

V. Venue

A. Defendants' Issue

22. Is the venue of the present action improper as to the 19 defendant operating companies which are not incorporated and do not render telephone service in the State of New York?

VI. Third Party Complaint

A. Defendants' Issues

23. If plaintiffs should prevail against any defendant on either their breach of duty claim or their overcollection claim, should the United States of America be adjudged liable to such defendant for any amounts for which such defendant may be adjudged liable to plaintiffs, with costs and disbursements?

24. If plaintiffs should prevail against any defendant on either their breach of duty claim or their overcollection claim, should the Court issue a certificate pursuant to

28 U.S.C. § 2006?

B. Third-Party Defendant's Issues

25. May any defendant assert jurisdiction against the United States as respects its third-party claim under 28 U.S.C. § 1340, 28 U.S.C. § 1346(a)(1), 28 U.S.C. § 1346(a)(2), 28 U.S.C. § 1346(b) or the principle of ancillary jurisdiction?

26. Has any defendant stated a claim against the United States upon which relief may be granted?

27. Has any defendant properly filed an administrative claim with the Internal Revenue Service that is legally sufficient to support its third-party claim for recovery against the United States either under 28 U.S.C. § 1346(a)(1) or 28 U.S.C. § 1346(b)?

28. Is the third-party claim of each defendant barred in whole or in part by the statute of limitations of 26 U.S.C. § 6511(a)?

29. Is the third-party claim of each defendant barred in whole or in part by the statute of limitations of 28 U.S.C. § 2401(b)?

30. As respects each defendant's third-party claim, has any employee of the Government, while acting within the scope of his office or employment, committed any negligent or wrongful act or omission causing injury or loss of property to the defendant?

31. Assuming any overcollection of federal taxes, have plaintiffs and, in turn, defendants, or any of them, satisfied the burden of showing the amount of federal taxes that they are entitled to recover from the United States under the internal revenue laws? (Defendants do not agree that this issue has been raised by the pleadings, and do not consent to an amendment of the pleadings to raise this issue.)

32. May the United States be held liable to defendants for a third-party claim arising out of a class action claim by plaintiffs against defendants for overcollection of federal taxes?

APPENDIX B

Plaintiffs' Factual Contentions

Summary

1. In June 1965, the Excise Tax Reduction Act of 1965, 79 Stat. 136 ("the Act"), became law. It contained, inter alia, an exemption from the federal communications excise tax for "private communication service" if a "separate charge" for such service was stated (26 U.S.C. §4252(d)). Centrex service, a telephone service providing both intercommunication (i.e., private communication service) and exchange access, had been introduced by the Bell System beginning in 1961 pursuant to tariffs that did not state separate charges for the exchange access and intercommunication portions of the service. Between the Act's effective date of January 1, 1966 and late in 1971, defendant American Telephone and Telegraph Company ("AT&T") and the 23 other defendants (hereinafter, the "defendant operating companies") agreed and conspired among themselves not to effect the separation of Centrex station charges for exchange access and for intercommunication, thereby depriving members of the plaintiff class of the benefit of the Act's exemption.

2. The defendants' agreement not to effect the separation of Centrex station charges for six years stemmed from the concern by rate officials of AT&T that any revision of filed Centrex tariffs could expose such tariffs to attack by state and local regulatory authorities and by customers. Centrex service provided defendants with certain hidden advantages, and this service, when introduced in 1961, was structured to maximize these advantages. Defendants were unwilling to risk these advantages merely to facilitate a customer tax advantage.

Only when it was in defendants' own self-interest, some six years after the Act's passage, did defendants finally effect the separation.

Background: the Bell System
introduces Centrex service

3. The reason why the defendants agreed not to effect separate Centrex station charges within a reasonable time after the Act's passage has its roots in some of the same factors which led defendants to introduce Centrex service in 1961 and in the relationship among the defendants.

4. During the period January 1, 1961 through December 31, 1972 ("the relevant period"), AT&T owned 100% of the capital stock of sixteen of the 23 defendant operating companies and in excess of 85% of the stock of five others. Of the remaining two, AT&T owned only a minority interest: Cincinnati Bell, Inc. ("Cincinnati Bell") 26% and Southern New England Telephone Co. ("SNET") 18%. Together with Western Electric Company, Inc. and Bell Telephone Laboratories, Inc., the defendants constitute the Bell System.

5. During the relevant period, agreements were in effect between AT&T and each defendant operating company covering services, licenses and privileges. By those agreements AT&T, which retained ownership of the interstate telephone lines and facilities, permitted each defendant operating company to connect with the interstate network and to use the equipment, methods and systems covered by AT&T's present and future patents, and required each defendant operating company to allow AT&T to interconnect the lines of the Bell System, to make interstate communications subject to such contracts as AT&T prescribed, and to require specified payments from

customers for interstate calls. AT&T also entered into agreements with each defendant operating company for division of revenues from the joint through rates of the system-wide network of the Bell System, for the provision of facilities for intercompany Bell System services, and for the retention by employees in the Bell System of their rights to pensions, disability benefits, and death benefits as they moved from company to company in the Bell System.

6. Beginning many years prior to 1961, and throughout the relevant period, the defendant operating companies offered to large business customers what is called Private Branch Exchange ("PBX") service, whose basic purpose is to connect telephone company central office trunks and tie lines to the telephone stations on the customer's premises and to interconnect the customer's own telephone stations. In a conventional dial PBX system, each of a customer's stations can dial each other such station (commonly referred to as "private communication" or "intercommunication") and can dial outgoing calls to the telephone exchange network (commonly referred to as "exchange access"). Calls coming in from the network are completed by the customer's PBX switchboard attendant.

7. Prior to 1961 PBX service was also offered by some defendant operating companies with one or both of two other service features, namely, (1) direct inward dialing (DID), meaning that an incoming call can be completed to a particular PBX telephone station without intervention of the switchboard attendant, and (2) identified outward dialing (IOD), meaning that outward toll calls dialed from a PBX station can be identified by station number for the customer's administrative purposes.

8. The charges to the customers for PBX service were, in effect, based not on the service package but on the items of equipment used to provide the service. Thus, a separate monthly charge was made, e.g., for each station, for the switching equipment on the customer's premises, and for each trunk giving access to the network.

9. The PBX dial switching equipment installed on the customer's premises to provide the service was known as step-by-step switching equipment. By 1961 the Bell System had an investment of upwards of $600 million in such equipment. By then, however, other switching equipment with greater capability had been developed by, and was in use in, the Bell System.

10. In 1960 AT&T initiated a study of how the Bell System should extend DID and IOD to all the areas served by the Bell System. AT&T focussed on what rate structure would preserve the value of the Bell System's investment in PBX step-by-step switching equipment, while facilitating the use of the switching equipment with greater capability, wherever and whenever costs and conditions made it desirable to the Bell System to do so.

11. To that end AT&T appointed a Task Committee of eight defendant operating companies' rate-making officials to work with representatives of AT&T's operations, engineering, marketing and rate divisions to develop for the defendant operating companies basic principles and procedures for the establishment of charges for a PBX-type service to be called Centrex service. Centrex was not the name given to new or

esoteric equipment. Centrex was the name given to the service already rendered in some states as dial PBX service with DID and IOD. However, the method of pricing was different. Instead of charging separately for each item of equipment (e.g., stations, switches, trunks), Centrex was to be charged for by packaging into the station rate the charges for the basic facilities and equipment required.

12. AT&T's instructions to the defendant operating companies for the implementation of Centrex service were contained in a letter (with accompanying notes) of April 28, 1961 from Hubert L. Kertz, AT&T's Assistant Vice President-Rate Division, supplemented by comprehensive binders. Copies of the material were sent to, and received by, each defendant operating company, and each knew from the face of the letter that such documents were sent to the other defendant operating companies.

13. The AT&T instructional material described the Centrex offering and its rate structure in detail. Centrex service was designed to be offered by two different methods. One was to be known as Centrex-CU, in which the conventional dial PBX step-by-step switching equipment located on the customers' premises would furnish intercommunication between the customers' telephone stations, while access to the telephone exchange network would be had through trunk lines running to the serving central office. The other method, to be known as Centrex-CO, would provide intercommunication through centralized switching, generally number five cross-bar (#5 X-bar) equipment, located in the serving central office. Under this method a pair of wires would run from each of the customers' telephone stations to the serving central office.

14. The costs of furnishing the service by the Centrex-CO method were stated by AT&T to be greater than those incurred in the Centrex-CU method, largely because of the greater cost in the Centrex-CO method of the pair of wires from each of the customers' stations to the central office, as compared to the lesser cost of the Centrex-CU trunk lines. Despite this disparity in costs, AT&T advised the defendant operating companies that the costs of the two methods should be averaged and that a single composite rate should be charged regardless of whether the serving method was Centrex-CU or Centrex-CO; only a slightly higher charge was to be made for Centrex-CO to reflect the value of floor space and power supplied at the central office when that method was used. The instructional material recited that promotionally and otherwise there were compelling and important reasons for such a single composite rate.

15. AT&T also emphasized to the defendant operating companies that the choice of serving method (whether Centrex-CU or Centrex-CO) should remain in their control and that it would be very unwise to promote any idea of differences between Centrex-CU and Centrex-CO as this would encourage customers to pick and choose, quite possibly to the Bell System's economic detriment. Indeed, the same service name, Centrex, a derivation of "Central Exchange," was applied to each serving method, even though Centrex-CU was clearly provided by private branch exchange (PBX) equipment rather than by central exchange equipment. The packaging into the station rate of what had previously been separate charges for the PBX items of equipment facilitated the reservation to the defendant operating companies of the choice by focussing the attention of customers (and

regulatory agencies) on the service features and away from the equipment.

16. AT&T recognized that the step-by-step equipment used in Centrex-CU was then incapable of rendering the identified outward dialing (IOD) service by automatic number identification (ANI), the most desirable form from a customer standpoint. Thus the less desirable method, i.e., passing the station number verbally to the telephone company operator, had to be used in Centrex-CU. In contrast where the service was rendered by the Centrex-CO method and the number five cross-bar (#5 X-bar) equipment was used, the number of the station making the call was automatically recorded, thus providing automatic identified outward dialing (AIOD) to the customer.

17. The Centrex-CU method was less desirable and less valuable to the customer than Centrex-CO in other respects, including the weight, noise and size of the equipment on the customers' premises and the comparative lack of flexibility, capability and accuracy of step-by-step switching equipment as compared to number five cross-bar (#5 X-bar) equipment.

18. The 1961 AT&T instructional material also described as an objective of Centrex service the improvement of overall telephone company return by the setting of charges so as to make an improvement of earnings on the basic PBX facilities to be used in rendering Centrex-CU service, without reapplying to the regulatory agencies for a rate increase. In the states where PBX service was offered with direct-inward-dialing (DID), AT&T advised that the offering should be made obsolete or that other steps should be taken rapidly to get all customers on the new -- and higher -- Centrex rates.

19. AT&T also advised the defendant operating companies that, in order to remain competitive with privately owned internal communication systems, fully restricted Centrex stations, permitting only intra-organization calls, should be offered to the customers.

20. AT&T made clear in 1961 that the overall goal was to make Centrex service the standard offering for substantially all customers then in the PBX category. The Bell System, AT&T noted, stood to reap large benefits from, among other things, faster service, more economical operation, reduction of circuit and operator holding time, decreased person-to-person and time-and-charge traffic, and increased use of the telephone network because of the Bell System program for direct distance dialing (DDD). The more the development of Centrex service, the more the Bell System would gain.

21. Each defendant operating company received the instructions of AT&T, agreed to follow them, and generally did follow them.

22. In February 1961 the defendant operating companies discussed in an operating conference with AT&T the foregoing principles for Centrex service, and all agreed that a consistent approach among the defendant operating companies was vital to the success of the Centrex offering.

23. As Kertz stated in the April 28, 1961 letter (supra, ¶12), it was generally agreed among AT&T and the defendant operating companies that several principles and fundamentals were of utmost importance in establishing the Centrex rate structure, namely, (1) maximum use should be made of the Bell System's $600 million investment in step-by-step dial PBX equipment, (2) policies, practices and rate treatment

should be designed to keep control of the choice of serving method (Centrex-CU or Centrex-CO) in the hands of the defendant operating companies to the maximum extent possible, and (3) to that end a single Centrex offering should be made, treated essentially the same for rate purposes regardless of the type of facilities used or their location (Centrex-CU or Centrex-CO).

24. Kertz emphasized that there was general agreement among AT&T and the defendant operating companies that uniformity of rate approach was of unusual importance since Centrex promised to become the standard service for larger customers with branch organizations scattered across the country. Uniform application of the principles and methods set forth by AT&T could be expected to result in rate schedules sufficiently alike to seem reasonable to such larger customers. In other words, uniformity of rate approach would ensure that the defendant operating companies did not charge rates so far apart as to cause complaints from national customers who were Centrex customers of more than one defendant operating company.

25. In May 1961 AT&T called a two day meeting of the defendant operating companies to explain further the Centrex offering and to reemphasize that it was most important to maintain uniformity of rate approach so that the charges of each would be close. At the meeting it was made clear that although Centrex-CU would subsidize Centrex-CO and although automatic number identification (ANI) was not available with Centrex-CU, a composite rate should be charged regardless of serving method, and that the choice of method should remain with the defendant operating companies. Material issued by AT&T for the meeting told the defendant operating companies not to permit the low rates previously charged for direct-inward-

dialing (DID) with PBX service to inhibit new and higher rates for Centrex.

26. The defendant operating companies, closely monitored by AT&T, developed Centrex rates and filed Centrex tariffs generally based upon the principles and methods set forth by AT&T.

The Excise Tax Reduction Act of 1965

27. Beginning in 1964, AT&T commenced a lobbying effort to obtain an exemption from the federal communications excise tax for those Bell System offerings facing competition from the intercommunication services furnished by equipment sold by non-Bell companies. Such services were not subject to the tax, since the tax applied only to services providing interconnection with the telephone exchange network. Tariffs filed with the Federal Communications Commission ("FCC") by AT&T and other defendants prohibited such interconnection by non-Bell equipment.

28. As a result of AT&T's lobbying efforts in 1964 and 1965, a revision of the federal communications excise tax was passed as part of the broader Act, signed into law on June 21, 1965, to take effect January 1, 1966.

29. The Act provided, inter alia, that "private communication service" for which a "separate charge" was made was not subject to tax (26 U.S.C. §4252(d)). The words "separate charge" originated in the draft submitted in 1964 by AT&T to the Government. The Act differed in one key respect from that draft. The draft had qualified the word "charge" to mean only a charge provided in a "local exchange

tariff." Despite efforts by AT&T to keep those words in the law they were deleted from the Act. Congress thus contemplated that the establishment of a "separate charge" could be affected merely by an allocation on the books of the defendant operating companies.

AT&T decides and the defendant operating companies agree not to separate Centrex station charges

30. In late 1964 and early 1965, while submitting drafts and other information to the Congressional staffs, AT&T focussed on the question of whether the Bell System should separate Centrex station charges in the event legislation were passed (i) exempting private communication for which a "separate charge" was made, and (ii) defining the word "charge" as a charge provided in a "local exchange tariff."

31. AT&T, in considering this issue, did not consult the interests of Centrex subscribers but considered only the Bell System's interests. AT&T considered primarily whether the marketing benefits to the Bell System would outweigh the problems attendant upon tariff changes. AT&T feared that the filing of revised tariffs, containing even such a non-controversial change as unpackaging Centrex station charges, would present a new opportunity for customers to object to the Centrex rates (which had been under attack by the United States as a Centrex customer) and for state and local regulatory agencies to review the Centrex rate structure. AT&T was concerned that such a review could result, among other things, in the division of Centrex into two separate service offerings, Centrex-CU and Centrex-CO, thereby removing from the defendant operating companies the economic benefits inherent in the choice of serving methods.

32. After the passage of the Act AT&T, despite the legislative history with which it was intimately familiar, advised the defendant operating companies that the word "charge" should be read as if it had said "tariff charge," that an allocation on the books of the defendant operating companies would be ineffective to establish a "separate charge," and that the tax should continue to be collected on the entire unrestricted Centrex service charge. Each defendant operating company knew that such advice was sent to all the other defendant operating companies.

33. In October 1965 two conferences convened by AT&T were held in New York to make sure that the defendant operating companies understood AT&T's interpretation of the Act and would implement the Act uniformly. Each of the defendant operating companies was represented at these conferences. Representatives of the rate division of AT&T announced at each of the conferences that, pursuant to a top level decision of AT&T, AT&T was adamant against the filing of tariffs separating the Centrex station charges because it was not desirable to reopen the Centrex tariffs solely in order to relieve customers of the additional taxation.

34. Each defendant operating company agreed with this position of AT&T, fully aware of the agreement of the other defendant operating companies to act uniformly. Each defendant operating company offering Centrex service, while extensively revising its books, records, methods and procedures to comply with certain portions of the Act, did so without separating the Centrex station charges and continued to bill and collect the federal communications excise taxes on the

entire unrestricted Centrex station charges. Thus the defendants -- including Cincinnati Bell and SNET -- conspired and agreed to maintain a uniform rate structure for Centrex service and to inflict an excessive federal tax on the Centrex customers. This agreement constituted a restraint of trade, affecting interstate commerce. In so agreeing, each defendant operating company placed its own interests over the interests of the members of the plaintiff class, to whom each owed a duty. AT&T was an aider and abettor, a co-conspirator and a joint wrongdoer with the defendant operating companies in violating the duties owed to the members of the plaintiff class.

35. By continuing to collect the tax on the entire unrestricted Centrex station charges defendants obtained the use of the excessive tax dollars collected from customers between the date of collection and the date of payment over to the United States.

36. So firm was the agreement among the defendants that four defendant operating companies making first offerings of Centrex service after 1966 followed in general the principles and methods agreed to by the defendants in 1961 and in 1964-65, including the package rate with no separate charge for private communication service.

37. When customers complained in the spring of 1966 and thereafter about the imposition of the tax on the intercommunication portion of Centrex service, AT&T informed the defendant operating companies that they should adhere to the position previously laid down and that separation of the charges should be refused. The defendant operating companies complied. At the urging of and with the concurrence and aid of AT&T, certain defendant operating companies sent false, misleading

and incomplete responses to customers, stating or implying that the Bell System had no option but to continue to collect a tax on an unseparated Centrex charge and intentionally omitting relevant language to the contrary contained in the Congressional Committee reports on the bills which became the Act.

38. Although between 1966 and 1972 a number of overtures were made by AT&T's comptroller's department and by others in the Bell System to the AT&T rate division to permit separation of the Centrex station charges to provide tax relief, in each instance the overture was rebuffed. The AT&T rate division maintained its previous adamant position even after Congress had extended the tax and had restored the rate from three to ten percent in the Tax Adjustment Act of 1966, signed March 15, 1966. AT&T knew throughout the period 1966-1971 that the federal communications excise tax would not be repealed within the foreseeable future.

AT&T and the defendant operating companies finally agree to separate Centrex charges

39. Although by early 1971 the Bell System was not faced with any serious competitive challenge to Centrex service, certain events had by then occurred which indicated the possibility of such competition in the future. In 1968 the FCC rendered a decision in the Carterfone case (13 FCC 2d 420) and struck down the tariff provisions filed by the Bell System prohibiting the interconnection of non-Bell System equipment with the telephone exchange network, on the grounds that such provisions were "unreasonable" and "unduly discriminatory" under the Communications Act of 1934, 47 U.S.C. §§151 *et seq*.

Under this decision the Bell System would thereafter be required to interconnect with the telephone network the equipment manufactured and sold by non-Bell Companies, provided such equipment did not harm the network.

40. Defendants realized by 1971 that non-Bell manufacturers were developing and would be marketing equipment capable of out dialing, DID and IOD and thus would be able to compete with Centrex service. The defendants also realized by 1971 that the federal communications excise tax imposed on the entire unrestricted Centrex charge would put their services at a competitive disadvantage with such non-Bell intercommunication services which would not be taxable because already the subject of a "separate charge."

41. Defendants further realized by 1971 that another occurrence had the potential for increasing the competitive disadvantage arising from the tax on the unseparated Centrex station charges. In July 1969, in the course of an audit of Southwestern Bell Telephone Company ("S.W. Bell"), the local Internal Revenue Service ("IRS") office had raised the question of whether the excise tax should apply to accessory equipment associated with Centrex and consisting of key illumination lights, hold buttons, winking lights, and the like. A decision that the charges for such equipment were taxable would increase the potential competitive disadvantage of Centrex service. The matter had been referred to the IRS National Office for advice, and no response had been received from that office by early 1971.

42. Commencing in January 1971 some of the defendant operating companies complained to AT&T that the tax on the unseparated Centrex station charges would place them at a competitive disadvantage. AT&T then focussed on the problem, but at least through early May 1971, requested that the defendant operating companies continue the unseparated Centrex rates. Thus, at least through early May 1971 AT&T maintained the same position it had in the past and refused to endorse the separation of Centrex rates.

43. In accordance with the need for uniformity of Centrex rate approach consistently emphasized by AT&T, no defendant operating company went off on its own and separated the Centrex charges in early 1971. They treated those charges as requiring systemwide and uniform treatment and continued to adhere to the agreement to maintain the unseparated charges as requested by AT&T.

44. By early June 1971 the pressure on AT&T to approve a separation of Centrex station charges had increased. New protests had come in from the defendant operating companies, more customers were complaining, and the IRS National Office had concluded that the charges for services rendered by the S.W. Bell accessory equipment associated with Centrex service were subject to tax. In addition, by early June 1971 General Telephone Company of California, an independent company not part of the Bell System, had submitted a proposal to the California Public Utilities Commission for the separation of its Centrex station charges.

45. By mid-June 1971 the rate division of AT&T concluded that it was in the Bell System's own interest to approve at long last the separation of Centrex station charges, and commenced preparation of instructions to the defendant operating companies as to how the separation should be made.

Even before the instructions were circulated to the defendant operating companies' personnel, one defendant, the Diamond State Telephone Company, which asserted it had an acute competitive problem relating to E.I. duPont de Nemours & Co. in Delaware and would be required to separate Centrex station charges at an early date, came to New York and received approval by AT&T of its proposed tariff containing the separation.

46. A "general letter" setting forth AT&T's method of separation of the Centrex station charges, together with detailed notes, were mailed under date of September 27, 1971 to all the defendant operating companies. Each defendant operating company knew from the face of the letter that the material was sent to the other defendant operating companies. The letter emphasized as singularly important that the defendant operating companies use a common method for separating the Centrex station charge. Any defendant operating company contemplating the use of a method of unbundling other than that set forth in the general letter was asked to submit the method to AT&T for review before taking any formal steps leading to revision of its tariffs.

47. The method of separation set forth in the September 27, 1971 general letter was to create a hypothetical trunk component for Centrex station charges, based upon data and information used by each defendant operating company in accordance with AT&T's 1961 recommendations for the introduction of Centrex service and its 1965 recommendations for the extension of Centrex service. Relabeled "Centrex Exchange Access Charge," that reconstructed trunk component was to become -- after the separation -- the only portion of the Centrex station charge on which the defendant operating companies would bill and collect the tax.

48. The letter also stated, among other things, that the separation should be made without increasing or decreasing the rates then in effect for any Centrex customer and without any net change in billing to a customer, and that salesmen should not quote a two component station rate but only the aggregate charge.

49. Prior to September 27, 1971 none of the defendant operating companies separated Centrex charges. After that date each of the defendant operating companies, including Cincinnati Bell and SNET, made the separation through the filing -- in 1971 or 1972 -- of revised tariffs. Each substantially followed the methodology described in the AT&T general letter of September 27, 1971. AT&T reviewed the proposals of some defendant operating companies before tariffs separating the Centrex charges were filed. AT&T closely monitored and followed-up the filing of such tariffs.

50. Such revised tariffs became effective in 1971-72 throughout the Bell System with almost no objection or substantial question by the regulatory bodies and with the enthusiastic approbation of the customers. AT&T's previous concern for maintaining uniform rate treatment, lest customers with Centrex installations served by more than one defendant operating company complain, was proven well founded in 1971. Customers with such multiple Centrex installations complained when the separation of rates and consequent tax relief for one installation was delayed beyond the date when another installation received tax relief.

51. During the period from January 1, 1966 through the date in 1971 or 1972 on which it effected the separation

of Centrex station charges for exchange access and for intercommunication, each defendant operating company had the data and information necessary for it to effect the separation and which, in fact, it ultimately used to do so.

52. During the period from January 1, 1966 through the date in 1971 or 1972 on which it effected the separation, each defendant operating company had the authority and the duty to separate Centrex station charges through an allocation on its books and records and, alternatively, to file revised tariffs incorporating such a separation. Such an allocation could have been readily made by the defendant operating companies.

53. It was the intent of Congress and of the President of the United States that Centrex subscribers benefit from the Act's exemption for private communication service. The defendant operating companies had the duty and obligation to separate Centrex charges within a reasonable time after the passage of the Act on June 21, 1965. Yet defendants, in refusing to make the separation between 1966 and 1971, acted as if they had unlimited discretion to determine when and if Centrex customers would receive this benefit.

54. The decision of defendants in 1971 finally to separate Centrex station charges proceeded solely from a determination of the self-interest of the Bell System. Defendants at long last followed, some six years after enactment, the terms of the 1965 Act. Between 1965 and 1971 there had been no further legislation or IRS ruling concerning the separation of Centrex charges.

55. Each defendant knew throughout the period July 1, 1965 through September 27, 1971 that all subscribers to Centrex service would be denied the benefit of the Act's exemption for private communication service until the Centrex station charges were separated and would be damaged in an amount equal to the tax collected on the intercommunication portion of Centrex station charges between 1966 and 1971 or 1972. The plaintiff class was so damaged.

Restricted Centrex Service

56. At all relevant times, the defendants provided -- as part of the Centrex offering -- fully restricted Centrex stations. These stations, unlike unrestricted Centrex stations, did not allow exchange access but were restricted to intercommunication. A separate charge was stated in the books and records of the defendant operating companies for such restricted stations.

57. Each defendant operating company knowing that it had no probable cause to collect the federal excise tax for the intercommunication component of Centrex service nevertheless continued to do so.

APPENDIX C

Defendants' Factual Contentions

The following statement summarizes the factual contentions which defendants will prove at the trial. No attempt has been made to list all of the evidentiary facts supporting such factual contentions, or to correct all of the errors which appear in Plaintiffs' Factual Contentions in Appendix B above. Unless otherwise expressly stated, the factual contentions set forth below relate to the period from January 1, 1961 through December 31, 1972.

I. Background

1. Defendant American Telephone and Telegraph Company ("AT&T") is a New York corporation with its principal place of business in New York, New York. Through its General Department AT&T renders advice and assistance to the defendant operating companies pursuant to License Contracts in effect between AT&T and each of the defendant operating companies. Through its Long Lines Department AT&T furnishes interstate telephone service between points served by different defendant operating companies. AT&T does not render any intrastate telephone service (including Centrex service).

2. The 23 defendants other than AT&T (the "defendant operating companies") render telephone service in their respective service areas. AT&T owns all or part of the capital stock of each of the defendant operating companies. The business of each defendant operating company is managed by the Board of Directors of such defendant operating company. The majority of the members of the Board of Directors of each defendant operating company are not and never have been employed by any of the defendants. One member of the Board of Directors of

each defendant operating company except Cincinnati Bell, Inc. is an officer of AT&T. None of the officers or employees of any defendant operating company is an officer or employee of AT&T.

3. Each of the defendant operating companies renders telephone service within its service area. Each defendant operating company also connects with the facilities of other telephone companies (including other defendant operating companies, telephone companies other than defendants, and the Long Lines Department of AT&T) in the case of calls to and from its service area.

4. The charges of the defendant operating companies for interstate telephone calls are subject to regulation by the Federal Communications Commission pursuant to Title II of the Federal Communications Act of 1934, 47 U.S.C. §§ 201-223. The Centrex station charges involved in the present action are not charges for interstate communication service, and are not subject to the Federal Communications Act.

5. Centrex service, like ordinary business and residential telephone service, is a local telephone exchange service. The monthly Centrex station charges involved in the present action, like the monthly rates for ordinary business and residential telephone service, represent payment for the use of the Centrex station to make calls within the local telephone exchange area (including intercommunication calls within the Centrex system itself).

6. The charges of the defendant operating companies for local telephone exchange service, including Centrex service, are subject to regulation by State or local regulatory authorities pursuant to applicable State laws. The charges of each of the defendant operating companies for Centrex service were required by law to be set forth, and were set forth, in tariffs

which were filed with State or local regulatory authorities and became effective pursuant to applicable State laws. Each defendant operating company complied in every respect with all tariffs relating to the Centrex station charges of such defendant operating company.

7. Each defendant operating company makes its own determination regarding the tariffs to be filed by such defendant operating company with State or local regulatory authorities. In making such determination a defendant operating company may consider, among other things, advice and recommendations furnished by AT&T pursuant to the License Contract. In each case, the final determination regarding the tariffs which are to become effective in each jurisdiction is made by the State or local regulatory authorities, which are empowered by the applicable State laws to disapprove proposed tariffs upon the grounds set forth in the applicable State laws.

8. Each of the defendant operating companies, within its service area, is the only telephone company which is authorized under the applicable State laws to render Centrex service. Each of the defendant operating companies, within its service area, is the only company which renders Centrex service.

II. The Initial Centrex Tariffs of the Defendant Operating Companies

9. A business or other organization which has a large number of personnel at one location generally will have more than one telephone and more than one exchange access line running from its telephones to the local telephone company central office. Such a subscriber often finds that there are many calls between its own telephones and desires a specific service for such intercommunication. The subscriber may provide this service for itself through leased or purchased equipment, or may subscribe to intercommunication service

provided by a telephone company.

10. For many years prior to 1961 the defendant operating companies provided Private Branch Exchange ("PBX") service. A subscriber to PBX service obtains the capability of intercommunication among the telephone stations within the subscriber's PBX system, as well as access to the telephone network through the local telephone company central office. PBX intercommunication service is furnished through PBX switching equipment which is generally located on the subscriber's premises. PBX exchange access service is furnished by means of "trunks" which connect the PBX switching equipment to the telephone company central office.

11. Under the governing tariffs filed with State or local regulatory authorities, a PBX subscriber generally paid a separate monthly charge for each PBX station, for each PBX trunk, and for each item of PBX switching equipment. Such "hardware-oriented" PBX rates proved to be cumbersome and complex in application. A prospective PBX customer could not be given a satisfactory estimate of the approximate monthly charges it could expect to pay until an engineering study had determined how many PBX trunks and how many items of PBX switching equipment would be needed to handle the customer's expected calling requirements.

12. In April 1961 AT&T sent to each of the defendant operating companies recommendations concerning a proposed new service offering termed Centrex service. Centrex service, like PBX service, provides the capability of intercommunication among the telephone stations within the subscriber's Centrex system, as well as access to the telephone network. Centrex service is characterized by direct inward dialing ("DID") and identified outward dialing ("IOD"). Direct inward dialing refers to the fact that each of the unrestricted

Centrex main stations ("Centrex stations") in a Centrex system is assigned its own seven-digit telephone number, and may be dialed directly from telephones outside the Centrex system by dialing that seven-digit number. Identified outward dialing refers to the capacity to provide individual billing of the message unit and toll calls made by each Centrex station. Some defendant operating companies had furnished PBX service with DID and/or IOD to a small number of customers (generally part of the United States Government) as early as 1959.

13. The April 1961 AT&T recommendations envisioned that the Centrex switching equipment might be located either on the customer's premises or in the telephone company central office. If the Centrex switching equipment was located on the customer's premises, the service was termed Centrex-CU ("CU" standing for "Customer"). If the Centrex equipment was located in the central office, the service was termed Centrex-CO ("CO" standing for "Company" or "Central Office"). In the case of Centrex-CU, the Centrex switching equipment on the customer's premises is connected to the telephone company central office by means of trunks. In the case of Centrex-CO, there is an individual line from the telephone company central office to each Centrex-CO station.

14. Centrex-CU service is functionally similar to Centrex-CO service, except in the location of the switching equipment. The April 1961 AT&T recommendations therefore recommended that each operating telephone company reserve the right to determine whether Centrex-CU or Centrex-CO service would be provided to any given customer, so as to insure that the most economic serving arrangement would be employed. In cases where the PBX switching equipment already on the customer's premises could be converted to Centrex-CU equipment, this fact might make Centrex-CU the most economic

serving arrangement. The April 1961 AT&T recommendations explained that if an operating telephone company did not retain the right to use the most economic serving arrangement for Centrex service, this would increase its average revenue requirements (and therefore its rates) for Centrex service.

15. The April 1961 AT&T recommendations also recommended that each operating company file tariffs establishing a single monthly charge for each Centrex station, without any separate monthly charge for Centrex switching equipment, Centrex-CU trunks, and Centrex-CO lines. It was recommended that the Centrex station charge for Centrex-CO be slightly higher than that for Centrex-CU, to reflect the fact that in the case of Centrex-CO the operating company provided floor space and power for the Centrex switching equipment. AT&T recommended the use of a single monthly Centrex station charge because such a charge was much easier to apply and to explain to customers than the more complex "hardware-oriented" PBX rates. Moreover, in the case of Centrex-CO there were no separately identifiable Centrex trunks or items of Centrex switching equipment. Instead, in the case of Centrex-CO there is an individual line from the telephone company central office to each Centrex-CO station, and Centrex-CO stations use switching equipment in the telephone company central office in common with other telephones served by that central office.

16. The April 1961 AT&T recommendations further suggested that where an operating company's PBX rates were earning less than a satisfactory rate of return as a result of cost changes since such rates were established, an operating company should attempt to establish Centrex rates which would yield a satisfactory rate of return, so that Centrex service would not result in a burden upon users of basic telephone service and other services. It was envisioned that

Centrex rates would generally be higher than PBX rates, but substantially below individual business line rates. AT&T pointed out that there might be limits to the disparity between Centrex station rates and individual business line rates.

17. Finally, the April 1961 AT&T recommendations stated that uniformity of rate approach among the operating companies would seem to be of unusual importance in the case of Centrex service, since Centrex service promised to become a "standard" service for larger customers with branch organizations scattered across the country. It was anticipated that such large customers would be aided in understanding Centrex service by having a more or less uniform rate approach to Centrex service in the various locations in which they might wish to subscribe to Centrex service. AT&T expressly recognized that each operating company would determine the level of Centrex rates to be set forth in its Centrex tariffs on the basis of its own anticipated costs and local conditions, and that there would be no uniformity of Centrex rate levels among the defendant operating companies.

18. At various times between 1961 and 1967 each defendant operating company filed tariffs covering Centrex service with State or local regulatory authorities. In formulating their initial Centrex tariffs, the defendant operating companies considered AT&T's recommendations, but used their own business judgment. There was no agreement by any defendant operating company to follow AT&T's recommendations.

19. The initial Centrex tariffs of the defendant operating companies all provided for direct inward dialing, identified outward dialing, and a single monthly Centrex station charge which covered both exchange access and intercommunication. In virtually every other respect, the initial

Centrex tariffs of one or more defendant operating companies differed from the AT&T recommendations. For example, some defendant operating companies did not offer both Centrex-CO and Centrex-CU service, and the tariffs of such companies and other defendant operating companies did not provide that the telephone company would determine whether Centrex-CO or Centrex-CU service would be provided to a given customer.

20. AT&T's recommendations concerning Centrex service, and the initial Centrex tariffs prepared and filed by the various defendant operating companies, were not intended to, and did not, in any manner fix, maintain, peg, or stabilize prices for Centrex service. There were wide variations among the defendant operating companies in the levels of the monthly Centrex station charges contained in the governing Centrex tariffs which were filed with State or local regulatory authorities and became effective pursuant to applicable State laws.

21. The United States of America, acting through the Department of Defense and the General Services Administration, filed complaints with the respective State regulatory authorities against the Centrex tariffs filed by defendant New York Telephone Company in New York and by defendant Southern Bell Telephone and Telegraph Company in Louisiana and Tennessee. The gravamen of these complaints was that the Centrex rates of New York Telephone Company and Southern Bell Telephone and Telegraph Company represented an unjustified increase over their PBX rates, and that the rates of return of New York Telephone Company and Southern Bell Telephone and Telegraph Company on Centrex service were excessive. The complaint filed with the Louisiana Public Service Commission was never prosecuted. The complaints filed with the New York State Public Service Commission and Tennessee Public Service Commission were dismissed on the merits, and the dismissal of the Tennessee complaint was upheld by the Tennessee courts.

22. During the entire period from January 1, 1961 through December 31, 1972, except as set forth in paragraph 21, no person complained to any State or local regulatory authority that the Centrex rates of any defendant operating company were excessive. During that entire period, no State or local regulatory authority held that the Centrex rates of any defendant operating company were excessive. The best estimates of the defendant operating companies were that their rates of return on Centrex service during this period were lower than or at best equal to the rates of return on which their initial Centrex filings were based.

III. The Excise Tax Reduction Act of 1965

23. From 1918 to 1924 and from 1932 to date, telephone service and other communications services have been subject to a Federal excise tax. The Excise Tax Reduction Act of 1965 (the "Act"), which repealed a number of Federal excise taxes, provided that the Federal communications excise tax would be reduced from 10% to 3% on January 1, 1966, 2% on January 1, 1967, and 1% on January 1, 1968, and would be eliminated on January 1, 1969.

24. For the interim period until the Federal communications excise tax was eliminated, Congress enacted a provision, Section 4252(d) of the Internal Revenue Code, 26 U.S.C. § 4252(d), exempting "private communication service" from the taxable category of "local telephone service". Section 4252(d) expressly provided that the term "private communication service" "does not include any communication service unless a separate charge is made for such service." The Act did not contain any mandate that any telephone company establish a "separate charge" for any portion of Centrex service or for any other service.

25. The House and Senate reports on the Act expressly

recognized that until a "separate charge" was established for the private communication service covered by the Centrex station charge, the "private communication service" exemption of Section 4252(d) would not apply:

> "For the reasons indicated above, your committee's bill provides an exemption from the tax on local telephone service for private communications service if a separate charge is made for this service. It is understood that private lines and PBX systems generally will immediately qualify for this exemption. However, it is understood that Centrex systems--where the switching equipment is generally on the premises of the local exchange rather than on that of the subscriber--generally do not, as yet, provide for a charge which is separate and distinct from that for local telephone service. Until such a separation is made, this exemption, therefore, will not apply in the case of Centrex service." H.R. Rep. No. 433, 89th Cong., 1st Sess. 31 (1965), 1965 U.S. Code Cong. & Admin. News 1645, 1677; S. Rep. No. 324, 89th Cong., 1st Sess. 36 (1965), 1965 U.S. Code Cong. & Admin. News 1690, 1726.

Neither the House and Senate reports on the Act nor any other portion of the legislative history of the Act contained any mandate that any telephone company establish a "separate charge" for Centrex service.

26. There are statutory provisions in all States which require that all charges of telephone companies for local telephone exchange service be incorporated in tariffs which have been filed with State or local regulatory authorities and which have become effective pursuant to the applicable State laws. The term "separate charge" in Section 4252(d) of the Act therefore means a separate charge contained in tariffs which have been filed with State or local regulatory authorities and which have become effective pursuant to the applicable State laws. Accordingly, under the Act, the question when and if a "separate charge" will be established for the private communication service covered by the Centrex station charges of any telephone company is subject to the authority of the

State or local regulatory authorities having jurisdiction over the Centrex service of such telephone company.

27. The conclusions stated in paragraphs 24 through 26 above are established by the plain terms of the Act and its legislative history, and are not subject to modification or variance by reference to informal exchanges between AT&T and the Department of the Treasury and Staff of the Joint Congressional Committee on Internal Revenue Taxation ("Joint Committee") prior to the passage of the Act. Moreover, the conclusions stated in paragraphs 24 through 26 above are supported by the facts relating to such informal exchanges. In particular, in December 1964 Dr. Lawrence N. Woodworth, the Chief of Staff of the Joint Committee, inquired how much revenue loss to the Government would be involved if the defendant operating companies were to establish a "separate charge" for Centrex service, and how long it might be before such a "separate charge" was established. By a letter dated December 17, 1964, Victor E. Ferrall, Esq., the General Tax Attorney of AT&T, informed Dr. Woodworth that there were no present plans to amend the Centrex tariffs of the defendant operating companies to establish separate Centrex station charges for exchange access and for intercommunication.

IV. The Filing of Revised Tariffs Establishing Separate Centrex Station Charges for Exchange Access and for Intercommunication

28. At various times beginning in 1964, certain individuals within AT&T considered whether or not to recommend to the responsible Assistant Vice President of AT&T that AT&T recommend to the defendant operating companies the filing of revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication. No such recommendation was made until 1971. The reasons why no such recom-

mendation was made until 1971 included the following:

(a) The Act provided that the Federal communications excise tax would be eliminated in its entirety by January 1, 1969. The final elimination of the tax was deferred in 1966, 1968, and 1969, but at all times from 1965 to 1970 the statutes enacted by Congress envisioned the complete elimination of the Federal communications excise tax within a relatively short period of years. On December 31, 1970, however, Congress enacted a ten-year program for the gradual elimination of the Federal communications excise tax.

(b) The determination of appropriate separations of Centrex station charges and the implementation of revised tariffs establishing separate Centrex station charges involved substantial complexity, administrative burden, time, and expense.

(c) There was concern that any method that might be used to separate the tariff charges for Centrex stations might be challenged by the Internal Revenue Service.

(d) There was concern that the filing of revised tariffs establishing separate Centrex station charges would contravene the original objective of simplicity and customer understanding of Centrex rates, and might lead to proceedings before State or local regulatory authorities. For the reasons stated in paragraphs 21 and 22 above, the concern was not that any regulatory authority might hold that the Centrex rates of any defendant operating company were too high, but rather that the Centrex tariffs might be questioned in some other respect.

29. There was no agreement by any defendant operating company not to file revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication. At various times between 1964 and 1969 certain individuals within AT&T discussed with individuals within certain defendant operating companies the possibility of filing such

revised tariffs, but no agreement on behalf of any defendant operating company not to file such revised tariffs was either sought or reached in any such discussion. At one or both of two conferences held in New York in October 1965 to acquaint personnel from the defendant operating companies with the provisions of the Act, one or more individuals from AT&T stated that Centrex station charges would remain subject to the Federal communications excise tax unless and until revised tariffs were filed establishing separate Centrex station charges for exchange access and for intercommunication. Again, no agreement by any defendant operating company not to file such revised tariffs was sought or reached.

30. The fact that the defendant operating companies did not file revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication until 1971 or 1972 was not intended to, and did not, in any way impede or restrain any person in competing with the Centrex service of any defendant operating company. On the contrary, the fact that the Federal communications excise tax was payable on the entire Centrex station charge, prior to the effective dates of such revised tariffs, adversely affected Centrex service by comparison with alternative services offered both by the defendant operating companies and by other persons.

31. The fact that the defendant operating companies did not file revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication until 1971 or 1972 did not result from any desire to obtain the benefit of the use of the Federal communications excise tax dollars collected from customers during the period (if any) between the date of collection and the date of payment over to the United States. Any such benefit which might have been realized by any defendant operating company was de minimis.

32. All of the Federal communications excise taxes

at issue in the present action were duly and timely paid to the United States by the defendant operating company which collected such taxes.

33. No person at any time requested any State or local regulatory authority to direct that the Centrex tariffs of any defendant operating company other than Northwestern Bell Telephone Company be amended to establish separate Centrex station charges for exchange access and for intercommunication.

34. No person requested any State or local regulatory authority to direct that the Centrex tariffs of Northwestern Bell Telephone Company be amended to establish separate Centrex station charges for exchange access and for intercommunication until after Northwestern Bell Telephone Company had determined to file revised tariffs establishing such separate charges.

35. On December 31, 1970 Congress enacted a ten-year program for the gradual elimination of the Federal communications excise tax at a rate of 1% a year commencing on January 1, 1972, thus establishing that the Federal communications excise tax would continue to be in effect for a substantial period of time. Early in 1971, individuals at AT&T began to formulate a proposed recommendation to the defendant operating companies for the filing of revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication. Such a recommendation was sent to the defendant operating companies on September 27, 1971. As stated in the AT&T recommendation, this recommendation was made at that time because:

(a) The legislation of December 31, 1970 established that the federal communications excise tax would continue to be in effect until January 1, 1982.

(b) The Internal Revenue Service had ruled in the course of an audit of Southwestern Bell Telephone Company that services associated with taxable Centrex stations were also subject to the Federal communications excise tax, thus increasing the taxes payable by Centrex customers.

(c) The fact that the Federal communications excise tax was payable on the entire Centrex station charge disadvantaged Centrex service in comparison with alternative services offered both by the defendant operating companies and by other persons.

36. Even before AT&T recommended the filing of revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication, certain defendant operating companies, including The Bell Telephone Company of Pennsylvania, The Diamond State Telephone Company, Illinois Bell Telephone Company, The Pacific Telephone and Telegraph Company, and Southwestern Bell Telephone Company, had individually concluded that such revised tariffs should be filed.

37. At various times in 1971 and 1972, each of the defendant operating companies filed revised Centrex tariffs establishing separate Centrex station charges for exchange access and for intercommunication. After consideration, some of the defendant operating companies decided to use the method of separation recommended by AT&T, while other operating companies decided to use different methods. There was no agreement by any defendant operating company either to file revised tariffs or to use the method of separation recommended by AT&T.

38. The revised tariffs filed by the defendant operating companies establishing separate Centrex station charges for exchange access and for intercommunication were permitted to go into effect by the State or local regulatory authorities having jurisdiction, with one exception. The Colorado Public Utilities Commission disapproved the revised tariffs filed by The Mountain States Telephone and Telegraph Company in Colorado to establish separate station charges for Centrex-CO, holding

that the revised tariff was unjust and unreasonable in that it discriminated in favor of Centrex-CO customers against individual business line customers. The Colorado Public Utilities Commission also held that Centrex-CO station rates should be raised until they were equal to individual business line rates.

39. The Internal Revenue Service is presently considering whether or not the methods used by the defendant operating companies to establish separate Centrex station charges for exchange access and for intercommunication are in its view "reasonable".

V. The Tariff Charges of Certain Defendant Operating Companies for Fully Restricted Centrex Stations

40. From January 1, 1966 through December 31, 1972, each of the defendant operating companies other than Michigan Bell Telephone Company had a tariff charge for fully restricted Centrex stations. A fully restricted Centrex station is a station which can only make or receive calls to or from other Centrex stations in the same Centrex system, and cannot reach the Centrex attendant or make or receive calls to or from telephones outside the Centrex system.

41. The tariff charge for a fully restricted Centrex station did not constitute a "separate charge" for the private communication service covered by the tariff charge for an unrestricted Centrex station. Unrestricted and fully restricted Centrex stations, as defined in the governing tariffs, are entirely separate and distinct. The revenue requirements of the private communication service covered by the unrestricted Centrex station charge generally are higher than those of a fully restricted Centrex station and include several categories of costs (such as the cost of attendant positions) which are not present in the case of a fully restricted Centrex station.

when the defendant operating companies filed revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication, the Centrex intercommunication charges set forth in such tariffs differed from the fully restricted Centrex station charges set forth in such tariffs.

VI. Venue

42. The defendants other than AT&T, The Chesapeake and Potomac Telephone Company, New England Telephone and Telegraph Company, New York Telephone Company, and Southern Bell Telephone and Telegraph Company are not incorporated in the State of New York, and are not found, do not do business, and do not transact business in the Southern District of New York.

APPENDIX D

Third-Party Defendant's Factual Contentions

The following statement generally outlines the factual contentions that the United States will prove at the trial. No attempt has been made to list all of the evidentiary facts supporting such factual contentions, or to correct any errors which appear in the Factual Contentions in Appendix B and C above.

1. Prior to filing the third-party complaint against the United States, each defendant, except AT&T, filed administrative refund claims (Form 843) with the Internal Revenue Service covering the excise taxes at issue. AT&T had not collected any of the federal taxes in issue and did not file any administrative claims. With infrequent exception, the claims filed covered all tax quarters from 1966 through 1972. These claims did not set forth facts and information sufficient to permit the Commissioner of Internal Revenue to authorize the tax refund presently sought, and the claims failed to comply with the requirements of the internal revenue laws and regulations thereunder. None of these defects were cured at any time prior to or even after commencement of defendants' third-party action. Thus, for example, at no time prior to or since commencement of the third-party action has any defendant established (nor can any defendant establish) that the taxes to which an administrative claim related had been returned to the person from whom collected or that the defendant had obtained the written consent of such person to the granting of a refund in favor of the defendant,

except insofar as consent is demonstrated by the prosecution of the present action by plaintiffs' class against defendants. In this regard, the three named plaintiffs presently assert that they have not given any consent to a refund claim by a defendant.

2. In addition, with the exception of Southern New England Telephone Company, all of the defendants that filed administrative claims covering the first quarter, 1970 and all prior tax quarters did so more than three years after the date on which corresponding Form 720 Quarterly Federal Excise Tax Returns had been filed and were required to be filed by each defendant under applicable federal law and regulation. As respects Southern New England Telephone Company, all of its administrative claims covering the third quarter, 1970 and all prior tax quarters were filed more than three years after the dates on which corresponding Form 720 Quarterly Federal Excise Tax Returns had been filed and were required to have been filed by that defendant under applicable federal law and regulation.

3. Other than the administrative claims (Form 843) discussed above, no administrative claims have been filed by any defendant with respect to the third-party claim presently asserted against the United States.

4. With respect to plaintiffs' overcollection of taxes claim, plaintiffs cannot establish any right to a refund of federal excise taxes by referring to defendants' charges for restricted Centrex stations. Such charges were not "separate charges" under 26 U.S.C. § 4252(d) and no excise taxes were overcollected from plaintiffs. Moreover, even if plaintiffs were to prevail on their "separate charge"

claim, the United States does not anticipate that the amount of plaintiffs' refund right will be shown, in part, because during the relevant period, plaintiffs' class paid monthly charges for certain services associated with taxable Centrex stations as to which federal excise taxes should have been, but were not, collected by defendants and paid over to the United States. Unless the amount of overcollected federal taxes is shown, defendants are not entitled to any recovery against the United States by reason of plaintiffs' overcollection claim. (Defendants do not agree that the factual contentions stated in the last two sentences are within the pleadings, and do not consent to an amendment of the pleadings to include such factual contentions.)

5. As respects any other claims asserted by plaintiffs against defendants, Government officials did not commit any acts or omissions giving rise to liability under defendants' third-party claims. The Government's involvement in this action arises solely out of its collection of federal excise taxes that defendants had initially collected from plaintiffs and paid over to the United States. Government employees did not commit any negligent or wrongful acts or omissions causing defendants' damages in this action. Nor can defendants establish any facts founded upon an Act of Congress, or any regulations, or upon any express or implied contract with the United States as a basis for recovery against the United States on defendants' third-party claim.

APPENDIX E

Plaintiffs' List of Trial Exhibits

Plaintiffs reserve the right to offer in evidence any document listed in the Stipulation as to Documents dated February 28, 1977. Plaintiffs further reserve the right to offer in evidence the following documents:

Answers and Objections to Plaintiffs' Second Wave Interrogatories, First Set, served by each defendant except AT&T, New York Telephone, Southern New England and Southwestern Bell.

Answers and Objections to Plaintiffs' Second Wave Interrogatories, Third Set, served by each defendant.

Answers and Objections to Plaintiffs' Second Wave Interrogatories, Fourth Set, served by each defendant.

Supplemental and Amended Answers to Plaintiffs' Second Wave Interrogatories, First Set, served by each defendant except AT&T, Southern Bell, Southern New England and Southwestern Bell.

Supplemental Answers to Plaintiffs' Second Wave Interrogatories, Fourth Set, served by AT&T, New York Telephone, Southern New England and Southwestern Bell.

Second Supplemental Answers to Plaintiffs' Second Wave Interrogatories, Fourth Set, served by AT&T, Southern New England and Southwestern Bell.

Supplemental Answers to Plaintiffs' Second Wave Interrogatories, First Set, served by each defendant except AT&T, New York Telephone, Southern New England, and Southwestern Bell.

H.R. Rep. No. 433, 89th Cong., 1st Sess. (1965), 1965 U.S. Code Cong. & Admin. News 1645.

S. Rep. No. 324, 89th Cong., 1st Sess. (1965), 1965 U.S. Code Cong. & Admin. News 1690.

Special Message to the Congress Recommending Reduction of Excise Taxes and Increases in User Charges, May 17, 1965, Public Papers of the Presidents of the United States, Lyndon B. Johnson, 1965 Vol. 1, No. 255.

Remarks at the Signing of the Excise Tax

Reduction Bill, June 21, 1965, Public
Papers of the Presidents of the United
States, Lyndon B. Johnson, 1965 Vol. 2,
No. 326.

Plaintiffs also reserve the right to offer into evidence any tariffs of any defendant operating company for Centrex service or any compilation of matters contained in such tariffs.

I. Defendants' Objections

Defendants reserve the right to object to the introduction into evidence of the documents listed in this Appendix and in the Stipulation as to Documents dated February 28, 1977 on the following grounds:

1. Defendants object to the introduction into evidence of any handwritten portion of any document (other than a document which is totally handwritten) which is not specifically transcribed or referred to in the Stipulation as to Documents dated February 28, 1977.

2. Defendants object to the introduction of any document other than a tariff to prove any matter contained in such tariff.

3. Defendants object on the ground of lack of authentication or identification to the introduction of Exhibits 15, 16, 17, 24, 35, 50, 58, 59, 62, 66B, 67, 71B, 86, 87, 88, 89, 90, 91, 92, 94, 95, 109, 113, 116, 129, 134, 142, 144, 145A-145B, 155, 191, 193, 194, 249, and 264.

4. Defendants object on the ground of hearsay to the introduction of Exhibits 13, 15, 16, 17, 24, 35, 38, 50, 54, 55A-55B, 56, 58, 59, 60, 62, 63, 64, 66A-66B, 67, 71A-71B, 72, 75, 77, 91, 92, 108, 109, 110, 111, 112, 113, 116, 119, 120, 121 (page 39387 only), 129, 134, 142, 143, 144, 145A-145B, 152, 153, 154, 170, 172, 173, 178, 179, 183, 185, 193, 194, 204, 205, 208, 248, 249, 262, and 264.

5. Defendants object on the ground of lack of completeness to the introduction of Exhibits 65, 93, and 94.

6. Defendants object to the introduction into evidence of any document against any defendant which is not expressly stated in the Stipulation as to Documents dated February 28, 1977 to have prepared or received such document.

7. Subject to paragraph 6 above, defendants do not object to the introduction of Exhibits 1A-1E, 2, 3A-3B, 4A-4C, 5, 6, 7A-7M, 8A-8D, 9, 10, 11, 12, 14, 18, 19, 20, 21, 22, 23, 26, 28, 33, 36, 37, 39, 40, 41, 42, 43, 44A-44E, 45, 46A-46B, 47, 49A-49C, 51A-51C, 53, 57, 61, 68, 69, 70, 73, 74, 78, 79, 80, 81, 82, 83, 102, 103, 105, 106, 107, 114, 115, 117A-117B, 118, 122, 124, 125A-125B, 126, 127, 128, 130, 131, 132, 133, 135, 136, 137, 138, 139, 140, 141, 146, 147, 148, 149, 150, 151, 156, 157, 159, 160, 161, 164, 165, 166, 167, 168, 169, 171, 174, 175, 176, 177, 180, 181, 182, 184, 186, 188, 189, 190, 192, 195, 196, 197, 198, 199, 203, 206, 207, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220A-220E, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 250, 251, 252, 253, 254, 255, 256, 257, 258, 265, 266, 267, and 268, and of the last four documents listed in this Appendix, upon the express understanding that each such exhibit is offered only for the facts stipulated with respect to such exhibit in the Stipulation as to Documents dated February 28, 1977, and not for the truth of any matter asserted in such exhibit.

8. Defendants reserve the right to object to the admission of any document on the ground of lack of relevance.

II. Third-Party Defendant's Objections

Third-party defendant reserves the right to object to the introduction into evidence of the documents listed in this Appendix and in the Stipulation as to Documents dated February 28, 1977 on the following grounds:

1. Third-party defendant objects to the introduction into evidence of any handwritten portion of any document (other than a document which is totally handwritten) which is not specifically transcribed or referred to in the Stipulation as to Documents dated February 28, 1977.

2. Third-party defendant objects to the introduction of any document other than a tariff to prove any matter contained in such tariff.

3. Third-party defendant objects on the ground of lack of authentication or identification to the introduction of Exhibits 15, 16, 17, 24, 35, 50, 58, 59, 62, 66B, 67, 71B, 86, 87, 88, 89, 90, 91, 92, 94, 95, 109, 113, 116, 129, 134, 135, 142, 144, 145A-145B, 155, 191, 193, 194, 249, and 264.

4. Third-party defendant objects on the ground of hearsay to the introduction of Exhibits 7A-7M, 13, 15, 16, 17, 24, 35, 38, 50, 54, 55A-55B, 56, 58, 59, 60, 62, 63, 64, 66A-66B, 67, 69, 71A-71B, 72A-72B, 73, 74, 75, 76, 77, 87, 88, 89, 90, 91, 92, 94, 95, 96, 97, 98, 99, 100, 101, 108, 109, 110, 111, 112, 113, 116, 119, 120, 121 (page 39387 only), 129, 134, 142, 143, 144, 145A-145B, 153, 154, 170, 172, 173, 178, 179, 183, 185, 191, 193, 194, 204, 205, 208, 248, 249, 262, and 264.

5. Third-party defendant objects on the ground of lack of completeness to the introduction of Exhibits 65, 93, and 94.

6. Third-party defendant does not object to the introduction of Exhibits 1A-1E, 2, 3A-3B, 4A-4C, 5, 6, 8A-8D, 9, 10, 11, 12, 14, 18, 19, 20, 21, 22, 23, 26, 28, 33, 36, 37, 39, 40, 41, 42, 43, 44A-44E, 45, 46A-46B, 47, 49A-49C, 51A-51C, 53, 57, 61, 68, 70, 78, 79, 80, 81, 82, 83, 102,

103, 105, 106, 107, 114, 115, 117A-117B, 118, 122, 124, 125A-125B, 126, 127, 128, 130, 131, 132, 133, 136, 137, 138, 139, 140, 141, 146, 147, 148, 149, 150, 151, 152, 156, 157, 159, 160, 161, 164, 165, 166, 167, 168, 169, 171, 174, 175, 176, 177, 180, 181, 182, 184, 186, 188, 189, 190, 192, 195, 196, 197, 198, 199, 203, 206, 207, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220A-220E, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 250, 251, 252, 253, 254, 255, 256, 257, 258, 265, 266, 267, and 268, and of the last four documents listed in this Appendix, upon the express understanding that each such exhibit is offered only for the facts stipulated with respect to such exhibit in the Stipulation as to Documents dated February 28, 1977, and not for the truth of any matter asserted in such exhibit.

7. Third-party defendant objects to the introduction into evidence of any document used to prove the truth of a statement made by or on behalf of the United States or to prove that acts described therein were taken by or on behalf of the United States.

8. Third-party defendant reserves the right to object to the admission of any document on the ground of lack of relevance.

APPENDIX F

Defendants' List of Trial Exhibits

Defendants reserve the right to offer in evidence any document listed in the Stipulation as to Documents dated February 28, 1977 which is not introduced into evidence by plaintiffs. Defendants further reserve the right to offer in evidence the following documents:

Plaintiffs' Supplemented Answers and Objections to Defendants' Second Interrogatories and Request for Production, dated September 9, 1976

Plaintiffs' Amended Responses and Objections to Request for Admissions, dated December 30, 1976

Amended Responses of United States to Defendants' Request for Admissions, dated February 1, 1977

Copies of the Interrogatory Answers Specified in Requests 12, 13, and 14 of Defendants' Request for Admissions dated November 19, 1976

Copies of the Documents Specified in Request 19 of Defendants' Request for Admissions dated November 19, 1976

Burnett Exhibits 2, 3, and 4 marked at the deposition of Barbara J. Burnett on February 11, 1977

Documents 09870-09879, 18080, and 18081-18084.

Defendants also reserve the right to offer into evidence any tariffs of any defendant operating company for Centrex service or any compilation of matters contained in such tariffs, and reserve the right to supply the Court with copies of any reported decisions, statutes, or other legal authorities.

I. Plaintiffs' Objection

Plaintiffs reserve the right to object to the admission of any documents on the ground of lack of relevance.

II. Third-Party Defendant's Objections

1. The third-party defendant reserves the right to object to the admission of any document on the ground of lack of relevance.

2. The third-party defendant incorporates by reference third-party defendant's objections listed in Appendix E above.

3. As respects the additional documents listed by defendants above, third-party defendant reserves the right to object on the ground of hearsay.

APPENDIX G

Third-Party Defendant's List of Trial Exhibits

Third-party defendant reserves the right to offer in evidence any document listed in the Stipulation as to Documents dated February 28, 1977 which is not introduced into evidence by plaintiffs or defendants. Third-party defendant further reserves the right to offer in evidence the following documents:

> Answers and Objections to Third-Party Defendant's Interrogatories of Defendants, served by each of the defendants, together with all documents referred to in such answers and made available for production.
>
> Plaintiffs' Answers and Objections to Third-Party Defendant's Interrogatories of Plaintiffs, together with all documents referred to in such answers and made available for production.

I. Plaintiffs' Objection

Plaintiffs reserve the right to object to the admission of any document on the ground of lack of relevance.

II. Defendants' Objections

Defendants reserve the right to object to the admission of any document on the grounds of hearsay and lack of relevance.

APPENDIX H

Depositions to be Offered in Evidence by Plaintiffs

Plaintiffs reserve the right in proving their *prima facie* case to read those portions of the depositions of the following listed persons which are hereinafter designated:

Glenn N. Appleyard
Thomas J. Burkinshaw
Ernest R. Charvat
Carl E. Erickson
Victor E. Ferrall
Ronald J. Foulis
John G. Fox
Frank L. Fuller, III
Robert M. Kemp
Hubert L. Kertz
Scott Shepherd
Harold A. Tindall
Alvin von Auw
Robert D. Weber
Robert G. Zender

Glenn N. Appleyard

p. 3, l. 20 through p. 6, l. 15
p. 6, l. 23 through p. 7, l. 6
p. 8, l. 19 through p. 9, l. 4
p. 9, l. 12 through p. 10, l. 24
p. 12, l. 20 through p. 13, l. 10
p. 14, l. 8 through p. 22, l. 9
p. 27, l. 11 through p. 28, l. 7

p. 30, l. 12 through p. 30, l. 25

p. 31, l. 6 through p. 32, l. 14

Thomas J. Burkinshaw

p. 3, l. 14 through p. 7, l. 17

p. 17, l. 21 through p. 18, l. 25

p. 41, l. 10 through p. 47, l. 9

p. 48, l. 2

Ernest R. Charvat

p. 3, l. 12 through p. 5, l. 17

p. 60, l. 24 through p. 62, l. 12

p. 64, l. 9 through p. 67, l. 6

Carl E. Erickson

p. 4, l. 6 through p. 14, l. 6

p. 15, l. 13 through p. 24, l. 19

p. 27, l. 21 through p. 28, l. 25

p. 29, l. 22 through p. 30, l. 21

p. 31, l. 23 through p. 32, l. 23

p. 34, l. 5 through p. 35, l. 10

p. 43, l. 24 through p. 44, l. 24

p. 61, l. 11 through p. 65, l. 3

p. 66, l. 24 through p. 73, l. 18

p. 79, l. 11 through p. 80, l. 25

p. 82, l. 24 through p. 83, l. 18

p. 88, l. 10 through p. 90, l. 11

Victor E. Ferrall

p. 3, l. 15 through p. 5, l. 21

Victor E. Ferrall (con't.)

p. 11, l. 20 through p. 12, l. 4

p. 14, l. 15 through l. 24

p. 19, l. 10 through p. 23, l. 15

p. 25, l. 10 through p. 30, l. 17

p. 30, l. 22 through p. 34, l. 19

p. 45, l. 8 through p. 48, l. 14

p. 52, l. 19 through p. 55, l. 5

p. 56, l. 9 through p. 57, l. 3

p. 72, l. 13 through l.20

p. 80, l. 5 through p. 81, l. 2

p. 88, l. 12 through p. 91, l. 21

p. 92, l. 12 through p. 93, l. 15

Ronald J. Foulis

p. 3, l. 14 through p. 15, l. 25

p. 17, l. 24 through p. 18, l. 21

p. 19, l. 14 through p. 20, l. 8

p. 20, l. 19 through p. 22, l. 15

p. 25, l. 6 through l. 17

p. 27, l. 8 through l. 19

p. 46, l. 13 through p. 47, l. 7

p. 58, l. 11 through p. 68, l. 6

John G. Fox

p. 3, l. 16 through p. 4, l. 15

p. 6, l. 5 through p. 9, l. 2

p. 10, l. 6 through l. 19

p. 12, l. 8 through l. 13

p. 16, l. 9 through p. 18, l. 20

John G. Fox (con't.)

p. 19, l. 18 through p. 21, l. 3

p. 22, l. 17 through l. 25

p. 30, l. 8 through p. 31, l. 3

p. 45, l. 16 through p. 46, l. 6

p. 53, l. 8 through p. 54, l. 15

p. 55, l. 11 through p. 57, l. 6

p. 59, l. 4 through l. 8

p. 62, l. 22 through p. 64, l. 15

p. 72, l. 10 through p. 81, l. 22

p. 83, l. 9 through p. 84, l. 22

p. 95, l. 18 through p. 96, l. 8

Frank L. Fuller, III

p. 3, l. 17 through l. 22

p. 4, l. 2 through l. 14

p. 4, l. 24 through p. 5, l. 11

p. 6, l. 3 through l. 14

p. 7, l. 6 through p. 8, l. 9

p. 8, l. 23 through p. 14, l. 3

p. 24, l. 5 through p. 31, l. 13

p. 36, l. 10 through p. 37, l. 9

p. 38, l. 22 through p. 39, l. 11

p. 60, l. 25 through p. 65, l. 7

p. 65, l. 18 through p. 76, l. 10

p. 77, l. 15 through p. 78, l. 11

p. 79, l. 13 through p. 101, l. 7

Robert M. Kemp

p. 3, l. 8 through l. 19

Robert M. Kemp (con't.)

p. 3, l. 24 through p. 21, l. 13
p. 22, l. 3 through p. 23, l. 5
p. 24, l. 21 through p. 25, l. 20
p. 28, l. 6 through p. 31, l. 21
p. 31, l. 23 through p. 37, l. 9
p. 37, l. 23 through p. 65, l. 8
p. 66, l. 11 through p. 74, l. 14
p. 74, l. 24 through p. 77, l. 23
p. 78, l. 15 through p. 83, l. 20
p. 84, l. 24 through p. 88, l. 11
p. 96, l. 24 through p. 116, l. 10
p. 145, l. 7 through l. 16
p. 149, l. 24 through p. 151, l. 8
p. 162, l. 16 through p. 164, l. 22
p. 167, l. 13 through p. 168, l. 4

Hubert L. Kertz

p. 3, l. 14 through p. 6, l. 22
p. 7, l. 21 through l. 24
p. 8, l. 13 through p. 9, l. 25
p. 15, l. 23 through p. 16, l. 9
p. 18, l. 22 through p. 27, l. 8
p. 27, l. 14 through p. 38, l. 3
p. 40, l. 3 through l. 25

Scott Shepherd

p. 3, l. 8 through p. 10, l. 25
p. 12, l. 20 through p. 15, l. 7
p. 18, l. 14 through p. 19, l. 15
p. 21, l. 18 through p. 41, l. 22

Harold A. Tindall

p. 3, l. 15 through p. 5, l. 4
p. 5, l. 9 through p. 14, l. 18
p. 23, l. 7 through p. 24, l. 25
p. 37, l. 7 through p. 42, l. 13
p. 44, l. 2 through l. 20
p. 45, l. 21 through p. 46, l. 9
p. 48, l. 7 through p. 49, l. 12
p. 49, l. 25 through p. 50, l. 22
p. 51, l. 8 through p. 52, l. 11
p. 54, l. 3 through l. 11
p. 61, l. 22 through p. 65, l. 14
p. 87, l. 17 through p. 89, l. 7

Alvin von Auw

p. 3, l. 14 through p. 4, l. 6
p. 28, l. 6 through l. 13
p. 29, l. 10 through l. 24
p. 51, l. 13 through p. 52, l. 21
p. 55, l. 20 through l. 22
p. 56, l. 15 through p. 64, l. 5
p. 67, l. 12 through p. 72, l. 18

Robert D. Weber

p. 3, l. 14 through p. 13, l. 3
p. 15, l. 2 through p. 16, l. 15
p. 18, l. 9 through p. 19, l. 4

Robert D. Weber (con't.)

p. 19, l. 25 through p. 48, l. 13

p. 48, l. 16 through p. 54, l. 17

p. 56, l. 14 through p. 57, l. 11

p. 58, l. 10 through p. 60, l. 3

p. 60, l. 18 through p. 63, l. 17

p. 66, l. 17 through p. 75, l. 18

p. 77, l. 15 through p. 80, l. 14

p. 81, l. 13 through l. 20

p. 82, l. 9 through p. 83, l. 10

p. 85, l. 21 through p. 93, l. 6

p. 94, l. 9 through p. 96, l. 5

Robert G. Zender

p. 3., l. 15 through p. 5, l. 24

p. 7, l. 7 through l. 14

p. 9, l. 17 through p. 10, l. 5

p. 10, l. 14 through p. 12, l. 14

p. 31, l. 20 through p. 36, l. 5

p. 36, l. 9 through p. 37, l. 20

p. 39, l. 7 through p. 41, l. 4

p. 48, l. 20 through l. 25

p. 49, l. 22 through p. 53, l. 5

APPENDIX I

Depositions to Be Offered in Evidence by Defendants

Defendants do not presently intend to read any portions of any depositions. Defendants reserve the right to read any portions of depositions listed in Appendix H which are not read by plaintiffs.

APPENDIX J

Depositions to be Offered in Evidence by Third-Party Defendant

Third-party defendant does not presently intend to read any portions of any depositions. Third-party defendant reserves the right to read any portions of depositions listed in Appendix H which are not read by plaintiffs or defendants.

APPENDIX K

Plaintiffs' List of Prospective Trial Witnesses

Plaintiffs intend to call as an expert witness Arthur D. Hall, III, President of Advanced Decision Handling, Inc. and Adjunct Professor, University of Pennsylvania.

Plaintiffs reserve the right to call as witnesses any of the following:

Glenn N. Appleyard
Assistant Vice President, Marketing
New York Telephone Company

Barbara J. Burnett
Supervisory Methods Accountant
The Pacific Telephone and Telegraph Company

Kenneth A. Hamming
General Pricing Supervisor
Michigan Bell Telephone Company

A. X. Ichter
Product Management Supervisor
The Bell Telephone Company of Pennsylvania

Robert M. Kemp
Manager, Docket No. 20003
American Telephone and Telegraph Company

Robert D. Weber
Business Relations Manager
American Telephone and Telegraph Company

APPENDIX L

Defendants' List of Prospective Trial Witnesses

The persons whom defendants intend to call as witnesses at the trial of this action are as follows:

Glenn N. Appleyard
Assistant Vice President, Marketing
New York Telephone Company

Barbara J. Burnett
Supervisory Methods Accountant
The Pacific Telephone and Telegraph Company

Kenneth A. Hamming
General Pricing Supervisor
Michigan Bell Telephone Company

A. X. Ichter
Product Management Supervisor
The Bell Telephone Company of Pennsylvania

Robert M. Kemp
Manager, Docket No. 20003
American Telephone and Telegraph Company

Robert D. Weber
Business Relations Manager
American Telephone and Telegraph Company

APPENDIX M

Third-Party Defendant's List of Prospective Trial Witnesses

Third-party defendant reserves the right to call the following witnesses:

Ernest R. Charvat
General Tax Attorney
Western Electric Company, Inc.

Norman Duberstein
Formerly Acting Chief, Excise
Tax Branch
Internal Revenue Service

Frank L. Fuller, III
General Tax Attorney
American Telephone and Telephone
Company

John Wallace
National Office, Audit Division
Internal Revenue Service

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

-against-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Third-Party Defendant.

- x

73 Civ. 2447 (EW)

STIPULATION OF FACTS

The following facts are stipulated to be true for the purposes of this action only, but the parties reserve the right to argue the relevance or lack thereof of any matter contained in this stipulation. Unless otherwise expressly stated, the following facts are stipulated to be true for the period from January 1, 1961 through December 31, 1972.

I. The Parties

A. The Plaintiffs

1. This action was brought individually and on behalf of other taxable Centrex customers of the defendant operating companies (as defined below) on June 1, 1973 by duPont Glore Forgan Incorporated ("duPont"), The Home Insurance Company ("Home"), Monsanto Company ("Monsanto"), Reynolds Securities, Inc. ("Reynolds Securities"), Schenley Industries, Inc. ("Schenley"), and Swift & Company ("Swift"). Prior to a determination of class status, duPont, Home, and Swift withdrew as representative plaintiffs.

2. Monsanto is a corporation organized under the laws of the State of Delaware with its principal place of business in St. Louis, Missouri. Monsanto was a Centrex customer of defendant New York Telephone Company in New York, New York and of defendant Southwestern Bell Telephone Company in St. Louis, Missouri. Monsanto was not a Centrex customer of any other defendant. For the year ending December 31, 1972 Monsanto had consolidated total assets of $2,236,900,000 and consolidated net income of $122,000,000. For the year ending December 31, 1975 Monsanto had consolidated total assets of $3,450,900,000 and consolidated net income of $306,300,000.

3. Reynolds Securities is a corporation organized under the laws of the State of Delaware with its principal place of business in New York, New York. Reynolds Securities was a Centrex customer of defendant New York Telephone Company in New York, New York, and was not a Centrex customer of any other defendant. Reynolds Securities had consolidated assets of $311,406,000 and net income of $9,024,000 for the year ending December 31, 1972. On January 1, 1976 Reynolds Securities became a wholly-owned subsidiary of Reynolds Securities International, Inc., which had consolidated assets of $279,486,000 and net income of $8,793,000 for the year ending December 31, 1975.

4. Schenley is a corporation organized under the laws of the State of Delaware with its principal place of business in New York, New York. Schenley was a Centrex customer of defendant New York Telephone Company in New York, New York, and was not a Centrex customer of any other defendant. For the year ending December 31, 1971 Schenley had consolidated total assets of $590,466,000 and consolidated net income of $85,036,000. On November 3, 1972 Schenley became a wholly-owned subsidiary of Rapid-American Corporation, which had consolidated total assets of $1,479,498,000 and consolidated net income of

$5,275,000 for the fiscal year ending January 31, 1976.

5. By order dated December 8, 1975, the Court ordered that the action may be maintained as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. Notice of class determination, together with a request for exclusion form, was duly sent to 1103 potential members of the class at 1569 Centrex locations. Seventy-four potential class members to whom notice was sent, with 163 Centrex locations, filed timely requests for exclusion. The plaintiff class consists of all persons who were taxable Centrex customers of one or more of the defendant operating companies at any time during the period between January 1, 1966 and the effective date in 1971 or 1972 of tariffs establishing separate Centrex station charges for exchange access and for intercommunication, and who did not request exclusion from the class.

B. The Defendants

6. Defendant American Telephone and Telegraph Company ("AT&T") is a corporation organized under the laws of the State of New York with its principal place of business at 195 Broadway, New York, New York. Through its General Department AT&T renders advice and assistance to the defendant operating companies pursuant to License Contracts in effect between AT&T and each of the defendant operating companies. Through its Long Lines Department AT&T furnishes interstate telephone service between points served by different defendant operating companies. AT&T does not render any intrastate telephone service (including Centrex service), and no member of the plaintiff class was a Centrex customer of AT&T. For the year ending December 31, 1972 AT&T had consolidated total assets of $60,625,045,000 and consolidated net income of $2,532,058,000.

7. The 23 defendants other than AT&T (the "defendant operating companies") are listed in Attachment A hereto. Attach-

ment A lists for each defendant operating company (1) its full name and the abbreviated name by which it is referred to herein, (2) its State of incorporation, (3) the approximate percentage of its outstanding capital stock owned by AT&T, (4) the States in which it renders telephone service, and (5) the State or local regulatory authorities which regulate the intrastate telephone service rendered by it in each such State.

8. The business of each defendant operating company is managed by the Board of Directors of such defendant operating company. The majority of the members of the Board of Directors of each defendant operating company are not and never have been employed by any of the defendants. One member of the Board of Directors of each defendant operating company except Cincinnati Bell is an officer of AT&T. None of the officers or employees of any defendant operating company is simultaneously an officer or employee of AT&T.

9. Each of the defendant operating companies renders telephone service within its service area. Each defendant operating company also connects with the facilities of other telephone companies (including other defendant operating companies, other operating telephone companies, and the Long Lines Department of AT&T) in the case of calls to and from its service area. The defendant operating companies serve approximately 80% of the Nation's telephones.

10. The charges of the defendant operating companies for interstate telephone calls are subject to regulation by the Federal Communications Commission pursuant to Title II of the Federal Communications Act of 1934, 47 U.S.C. §§ 201-223. The amounts received by each of the defendant operating companies as compensation for the use of unrestricted Centrex stations are not charges for interstate communication service, and are not subject to the Federal Communications Act.

11. The amounts received by each of the defendant operating companies as compensation for the use of unrestricted Centrex stations are subject to regulation by State or local regulatory authorities pursuant to applicable State laws. The rates of each of the defendant operating companies for Centrex service were set forth in tariffs which were filed with State or local regulatory authorities and became effective pursuant to applicable State laws. Plaintiffs will not contest in this action that each defendant operating company complied in every respect with all tariffs relating to the Centrex station charges of such defendant operating company.

12. Each of the defendant operating companies, within its service area, is the only telephone company which is authorized under the applicable State laws to render Centrex service. Each of the defendant operating companies, within its service area, is the only company which renders Centrex service.

13. Western Electric Company, Inc. ("Western Electric") is a corporation organized under the laws of the State of New York with its principal place of business at 195 Broadway, New York, New York. Until October 1966 AT&T owned 99.85% of the capital stock of Western Electric, and since October 1966 AT&T has owned 100% of the capital stock of Western Electric. Western Electric was engaged in the manufacture and sale of communications equipment, and sold and shipped such equipment to each of the defendant operating companies. Bell Telephone Laboratories, Inc. ("Bell Laboratories") is a corporation organized under the laws of the State of New York with its principal place of business in Murray Hill, New Jersey. The capital stock of Bell Laboratories is owned 50% by AT&T and 50% by Western Electric. The defendants, together with Western Electric and Bell Laboratories, are sometimes referred to in AT&T annual reports, in public advertising, and otherwise as the "Bell System."

14. AT&T has made advances of funds ranging up to $8,200,000 to Cincinnati Bell and ranging up to $17,600,000 to Southern New England.

C. The Third-Party Defendant

15. The third-party defendant is the United States of America.

II. General Description of Certain Telephone Services

16. Paragraphs 17-33 contain a general description of certain telephone services. This general description is presented solely for the purpose of introducing the reader to such telephone services, and does not purport to be an authoritative description of such services as rendered by any of the defendant operating companies. The definitive description of a given telephone service as rendered by a given defendant operating company in a given jurisdiction is set forth in the governing tariffs for that service filed with State or local regulatory authorities.

A. Local Telephone Exchange Service

17. A subscriber to local telephone exchange service obtains the privilege of making calls within the local telephone exchange area defined by the governing tariffs and of receiving telephone calls from any telephone within or outside the local telephone exchange area. A subscriber to local telephone exchange service also obtains the privilege of making (for an additional message unit or toll charge) message unit or toll calls outside the local telephone exchange area.

18. A subscriber to local telephone exchange service obtains access to the telephone network through a "line" or "loop" (usually consisting of a pair of wires) which is run from a local central office of the telephone company to the subscriber's premises. The line commonly is identified by a

three-digit area code plus a seven-digit telephone number. At the subscriber's end, the line terminates in what is often referred to as a "station." A "station" is a broad term used to describe the telephone or other equipment used by a subscriber at the subscriber's end of the line.

19. When a local telephone call is dialed to another telephone served by the same central office, switching equipment at the central office connects the line from the originating telephone to the line of the called telephone and a communication channel is thereby established. When both parties within a local telephone exchange area are not served by the same central office, additional switching by equipment at different central offices is required.

20. For long-distance calls, several switching operations by equipment at different locations are usually necessary. For example, a call from Chicago to New York may be switched: (1) from the telephone company central office which serves the caller to a toll center which serves the Chicago area; (2) from that toll center to a toll center which serves the New York area; (3) from that toll center to the telephone company central office which serves the party called; and (4) from that central office to the party called.

21. A business or other organization which has a large number of personnel at one location generally will have more than one exchange access line and more than one telephone. Such a subscriber often finds that there are many calls between its own telephones and desires a specific service for such intercommunication. The subscriber may provide this service for itself through purchased or leased equipment, or may subscribe to intercommunication service provided by a telephone company.

B. PBX Service

22. Private Branch Exchange ("PBX") service was first furnished by the defendant operating companies many years prior to 1961. A subscriber to PBX service obtains the capability of intercommunication among the telephone stations within the subscriber's PBX system, as well as access to the telephone network. PBX intercommunication service is furnished through PBX switching equipment which is generally located on the subscriber's premises. PBX station lines connect the PBX stations to the PBX switching equipment. PBX exchange access service is furnished by means of "trunks" which connect the PBX switching equipment to the telephone company central office.

23. An incoming call from outside the PBX system arrives over one of the trunks connecting the PBX switching equipment to the telephone company central office, and is generally answered by an attendant at the PBX switchboard. The calling party then gives the attendant the name or PBX extension number of the individual being called, and the call is switched to the PBX station line of the individual being called.

24. An outgoing call from a PBX station is switched by the PBX switching equipment - either directly by automatic switching equipment, or by the PBX switchboard attendant - to one of the trunks connecting the PBX switching equipment to the telephone company central office. At the telephone company central office further switching connections are made as described in paragraphs 19 and 20 above. Message unit and toll calls from a PBX station are not generally identified for billing purposes by the individual PBX station making the call.

25. A call from one PBX station to another within a subscriber's PBX system is switched by the PBX switching equipment - either directly by automatic switching equipment, or by the PBX switchboard attendant - from the calling PBX station

to the called PBX station.

26. Under the governing tariffs filed with State or local regulatory authorities, a PBX subscriber generally pays a separate monthly charge for the service provided by each PBX station and a separate monthly charge for the service provided by each PBX trunk. In addition, a PBX subscriber generally pays monthly charges for the services provided by PBX switching equipment and attendant positions, as well as for associated services.

C. Centrex Service

27. Centrex service, like PBX service, provides the capability of intercommunication among the telephone stations within the subscriber's Centrex system, as well as access to the telephone network. Centrex service is characterized by direct inward dialing ("DID") and identified outward dialing ("IOD"). Direct inward dialing refers to the fact that each of the unrestricted Centrex stations in a Centrex system is assigned its own seven-digit telephone number (e.g., 791-0108), and may be dialed directly from telephones outside the Centrex system by dialing that seven-digit telephone number. Identified outward dialing refers to the capacity to provide individual billing of the message unit and toll calls made by each Centrex station.

28. Some defendant operating companies, namely, Bell of Pennsylvania, Chesapeake and Potomac, C&P of Virginia, Diamond State, Mountain States, New England, New Jersey Bell, New York Telephone, Northwestern Bell, South Central Bell, Southern Bell, and Southwestern Bell, furnished PBX service with direct inward dialing to one or more customers. Direct inward dialing was first offered by a Bell System company as early as 1959.

29. Some defendant operating companies, namely, Bell of Pennsylvania, Chesapeake and Potomac, C&P of Virginia, Diamond

State, South Central Bell, and Southern Bell, furnished PBX service with identified outward dialing to one or more customers. Identified outward dialing was first offered by a Bell System company as early as 1959.

30. The Centrex switching equipment may be located either on the customer's premises or in the telephone company central office. If the Centrex switching equipment is located on the customer's premises, the service is termed Centrex-CU ("CU" standing for "Customer"). If the Centrex switching equipment is located in the central office, the service is termed Centrex-CO ("CO" standing for "Company" or "Central Office"). In the case of Centrex-CU, the Centrex switching equipment on the customer's premises is connected to the telephone company central office by means of trunks. In the case of Centrex-CO, there is an individual line from the telephone company central office to each Centrex-CO station.

31. Centrex-CU service is functionally similar to Centrex-CO service, except in the location of the switching equipment. In the case of both Centrex-CU and Centrex-CO, an incoming call from outside the Centrex system may be dialed directly to the desired Centrex station, or may be dialed through an attendant as described in paragraph 23 above in the case of PBX service. Outgoing calls and calls within the Centrex system may be completed as described in paragraphs 24 and 25 above in the case of PBX service.

32. A Centrex station may generally be unrestricted, fully restricted, or partially restricted. An unrestricted Centrex station can both make and receive all types of calls, including incoming and outgoing message unit and toll calls. A fully restricted Centrex station can only make or receive calls to or from other Centrex stations in the same Centrex system, and cannot reach the Centrex attendant or make or

receive calls to or from telephones outside the Centrex system. A partially restricted Centrex station is a station which is partially but not fully restricted in the calls which it can make or receive. Unless otherwise specified, all references herein to Centrex stations are to unrestricted Centrex stations.

33. Until revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication became effective in 1971 or 1972, under the governing tariffs filed with State or local regulatory authorities a Centrex subscriber paid a single monthly charge for each Centrex station which covered both exchange access and intercommunication. A Centrex subscriber did not pay any separate monthly charge for Centrex switching equipment, Centrex-CU trunks, or Centrex-CO lines. A Centrex subscriber generally paid monthly charges for the services provided by Centrex attendant positions, as well as for associated services.

III. The Centrex Tariffs of the Defendant Operating Companies

34. Attachment B lists the dates on which the initial Centrex tariffs of the defendant operating companies were filed with State or local regulatory authorities, and the dates on which such initial Centrex tariffs became effective pursuant to applicable State laws.

35. The initial Centrex tariffs of the defendant operating companies all provided for direct inward dialing, identified outward dialing, and a single monthly Centrex station charge which covered both exchange access and intercommunication. Attachment C sets forth the following additional information with respect to the initial Centrex tariffs of the defendant operating companies: (1) whether such tariffs included the service features of Centrex service suggested by AT&T; (2) the minimum number of Centrex stations specified by such

tariffs; (3) whether such tariffs contained a higher Centrex station charge for Centrex-CO than for Centrex-CU; (4) whether such tariffs contained a lower monthly charge for fully restricted Centrex stations than for unrestricted Centrex stations; (5) the initial contract period specified by such tariffs; (6) whether such tariffs provided for both Centrex-CO and Centrex-CU; and (7) whether such tariffs specified that the telephone company would determine whether Centrex-CO or Centrex-CU would be provided to a given customer.

36. Attachment D lists the monthly charges for Centrex stations as set forth in the governing Centrex tariffs which were in effect on January 1, 1963.

37. Attachment E lists the monthly charges for Centrex stations as set forth in the governing Centrex tariffs which were in effect on January 1, 1966.

38. Attachment F sets forth the minimum numbers of Centrex stations specified by the governing Centrex tariffs which were in effect during the period from January 1, 1961 to December 31, 1972.

39. At various times in 1971 and 1972, the defendant operating companies filed revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication. Attachment G lists the dates on which such revised tariffs were filed with State or local regulatory authorities and the dates on which such revised tariffs became effective. The revised tariff filed by New York Telephone in New York decreased its Centrex station charges by an amount which was estimated to reduce its revenues by $1,100 in the first year. The revised tariff filed by C&P of West Virginia, which was filed simultaneously with revised tariffs proposing increases in rates for other telephone services, proposed to increase its Centrex station charges by the same proportion for exchange

access and for intercommunication. The revised tariffs filed by the other defendant operating companies did not result in any change in their total Centrex station charges.

40. Plaintiffs will not contest that no person at any time requested any State or local regulatory authority to direct that the Centrex tariffs of any defendant operating company other than Northwestern Bell be amended to establish separate Centrex station charges for exchange access and for intercommunication.

41. Plaintiffs will not contest that no person requested any State or local regulatory authority to direct that the Centrex tariffs of Northwestern Bell be amended to establish separate Centrex station charges for exchange access and for intercommunication until after September 27, 1971.

42. Between January 1, 1966 and September 27, 1971, each of the defendant operating companies other than Bell of Pennsylvania, Diamond State, Michigan Bell, Mountain States, New Jersey Bell, and Southern New England had the information and data necessary to prepare and file revised tariffs incorporating a separation of Centrex station charges for exchange access and for intercommunication in accordance with the method of separation that was used by such defendant operating company in the revised tariffs filed in 1971 or 1972.

43. Some changes generally are made to the books and records of the defendant operating companies when any tariff change becomes effective.

44. Some changes in commercial practices generally would be required when any tariff change became effective.

IV. Federal Excise Tax Collection

45. Before the revised tariffs described in paragraph

39 above became effective, each of the defendant operating companies collected from taxable Centrex customers, and paid over to the United States, Federal communications excise taxes on the total Centrex station charge.

46. After the revised tariffs described in paragraph 39 above became effective, the defendant operating companies collected from taxable Centrex customers, and paid over to the United States, Federal communications excise taxes on the Centrex exchange access charge but not on the Centrex intercommunication charge.

47. All of the Federal communications excise taxes described in paragraph 45 above were duly and timely paid to the United States by the defendant operating company which collected such taxes.

V. Identification of Employees

48. Attachment H lists certain persons who were employed by AT&T for the periods and in the positions indicated in Attachment H. Attachment H also lists, for each position, the number of reporting levels between that position and the AT&T Vice President to whom that position reported.

49. Glenn N. Appleyard has been an Assistant Vice President, Marketing of New York Telephone since 1973. He was a General Sales Manager of New York Telephone between 1971 and 1973, and was an Assistant Vice President, Marketing of New York Telephone between 1969 and 1971.

VI. Venue

50. All of the defendants except AT&T, Chesapeake and Potomac, New England, New York Telephone, and Southern Bell have asserted the defense of improper venue. Unless otherwise expressly stated, paragraphs 51-62 relate to the 19 defendant operating companies which have asserted the defense of improper

venue, and relate to the period from January 1, 1966 through December 31, 1973 (except for South Central Bell, which commenced operations on July 1, 1968). The term "New York" as used in paragraphs 51-62 means the State of New York.

51. None of the defendant operating companies other than New York Telephone offered or provided any telecommunications service (including Centrex service) in New York.

52. None of the 19 defendant operating companies had any customers for which it provided communications service or advertising in the Yellow Pages in New York.

53. None of the 19 defendant operating companies maintained any office in New York.

54. None of the 19 defendant operating companies had any mailing address or any telephone listing in New York.

55. None of the 19 defendant operating companies had any real property in New York.

56. None of the 19 defendant operating companies warehoused any goods in New York.

57. Fourteen of the 19 defendant operating companies had no bank accounts in New York. Attachment I lists, for each of the five defendant operating companies which had bank accounts in New York, (1) the banks at which such accounts were maintained, (2) the period for which such accounts were maintained, and (3) the approximate average balance in such accounts.

58. Goods, products, or equipment were shipped from New York to each of the 19 defendant operating companies.

59. Each of the 19 defendant operating companies was a party to at least one contract which was negotiated, entered into, or performed in New York.

60. Various officers of the 19 defendant operating companies were in New York on business from time to time during the period between January 1, 1966 and December 31, 1973. Attach-

ment J shows (1) the approximate total number of days spent in New York on business by all officers of each of the 19 defendant operating companies during the entire period from January 1, 1966 through December 31, 1973, and (2) the approximate average number of days spent in New York on business by all officers of each of the 19 defendant operating companies during each year of the period from January 1, 1966 through December 31, 1973.

61. AT&T provided advice and assistance, at least in part from the Southern District of New York, in reviewing areas in which advertising may be desirable and in recommending advertising programs to the defendant operating companies. AT&T did not render any advice and assistance with respect to the advertising of Centrex service.

62. The amounts spent by AT&T for advertising in all media for the Bell System as a whole were $14.6 million in 1966, $13.1 million in 1967, $12.0 million in 1968, $12.2 million in 1969, $11.9 million in 1970, and $12.8 million in 1971.

Dated: New York, New York
February 28, 1977

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SO ORDERED THIS 28th DAY
OF February, 1977

s/ Edward Weinfeld
U.S.D.J.

ATTACHMENT A

The Defendant Operating Companies

endant Operating Company	State of Incorporation	Percentage of Capital Stock Owned by AT&T	States in Which Service Is Rendered	State or Local Regulatory Authorities
Bell Telephone Company f Pennsylvania ("Bell f Pennsylvania")	Pennsylvania	100%	Pennsylvania	Pennsylvania Public Utility Commission
Chesapeake and Potomac elephone Company "Chesapeake and Potomac")	New York	100	District of Columbia	District of Columbia Public Service Commission
Chesapeake and Potomac elephone Company of aryland ("C&P of aryland")	Maryland	100	Maryland	Maryland Public Service Commission
Chesapeake and Potomac elephone Company of rginia ("C&P of rginia")	Virginia	100	Virginia	Virginia State Corporation Commission
Chesapeake and Potomac elephone Company of st Virginia ("C&P of st Virginia")	West Virginia	100	West Virginia	West Virginia Public Service Commission

Defendant Operating Company	State of Incorporation	Percentage of Capital Stock Owned by AT&T	States in Which Service Is Rendered	State or Local Regulatory Authorities
Cincinnati Bell, Inc. ("Cincinnati Bell")	Ohio	26%	Kentucky	Kentucky Public Service Commission
			Ohio	Ohio Public Utilities Commission
The Diamond State Telephone Company ("Diamond State")	Delaware	100	Delaware	Delaware Public Service Commission
Illinois Bell Telephone Company ("Illinois Bell")	Illinois	99.3	Illinois	Illinois Commerce Commission
			Indiana	Indiana Public Service Commission
Indiana Bell Telephone Company ("Indiana Bell")	Indiana	100	Indiana	Indiana Public Service Commission
Michigan Bell Telephone Company ("Michigan Bell")	Michigan	100	Michigan	Michigan Public Service Commission
The Mountain States Telephone and Telegraph Company ("Mountain States")	Colorado	88.55	Arizona	Arizona Corporation Commission
			Colorado	Colorado Public Utilities Commission
			Idaho	Idaho Public Utilities Commission

Defendant Operating Company	State of Incorporation	Percentage of Capital Stock Owned by AT&T	States in Which Service Is Rendered	State or Local Regulatory Authorities
The Mountain States Telephone and Telegraph Company (cont'd)			Montana	Montana Public Service Commission
			New Mexico	New Mexico State Corporation Commission
			Texas	Local Regulatory Authorities
			Utah	Utah Public Service Commission
			Wyoming	Wyoming Public Service Commission
New England Telephone and Telegraph Company ("New England")	New York	71% (Note 3)	Maine	Maine Public Utilities Commission
			Massachusetts	Massachusetts Department of Public Utilities
			New Hampshire	New Hampshire Public Utilities Commission
			Rhode Island	Rhode Island Public Utilities Commission

Defendant Operating Company	State of Incorporation	Percentage of Capital Stock Owned by AT&T	States in Which Service Is Rendered	State or Local Regulatory Authorities
New England Telephone and Telegraph Company (cont'd)			Vermont	Vermont Public Service Board
New Jersey Bell Telephone Company ("New Jersey Bell")	New Jersey	100%	New Jersey	New Jersey Board of Public Utility Commissioners
New York Telephone Company ("New York Telephone")	New York	100	Connecticut	Connecticut Public Utilities Commission
			New York	New York State Public Service Commission
Northwestern Bell Telephone Company ("Northwestern Bell")	Iowa	100	Iowa	Iowa State Commerce Commission
			Minnesota	Minnesota Public Service Commission
			Nebraska	Nebraska State Railway Commission
			North Dakota	North Dakota Public Service Commission
			South Dakota	South Dakota Public Utilities Commission
The Ohio Bell Telephone Company ("Ohio Bell")	Ohio	100	Ohio	Ohio Public Utilities Commission

Defendant Operating Company	State of Incorporation	Percentage of Capital Stock Owned by AT&T	States in Which Service Is Rendered	State or Local Regulatory Authorities
Pacific Northwest Bell Telephone Company ("Pacific Northwest") (Note 1)	Washington	89.3%	Idaho	Idaho Public Utilities Commission
			Oregon	Oregon Public Utility Commissioner
			Washington	Washington Utilities and Transportation Commission
The Pacific Telephone and Telegraph Company ("Pacific")	California	89.79	California	California Public Utilities Commission
South Central Bell Telephone Company ("South Central Bell") (Note 2)	Delaware	100	Alabama	Alabama Public Service Commission
			Kentucky	Kentucky Public Service Commission
			Louisiana	Louisiana Public Service Commission
			Mississippi	Mississippi Public Service Commission
			Tennessee	Tennessee Public Service Commission

Defendant Operating Company	State of Incorporation	Percentage of Capital Stock Owned by AT&T	States in Which Service Is Rendered	State or Local Regulatory Authorities
Southern Bell Telephone and Telegraph Company ("Southern Bell")	New York	100%	Florida	Florida Public Service Commission
			Georgia	Georgia Public Service Commission
			North Carolina	North Carolina Utilities Commission
			South Carolina	South Carolina Public Service Commission
Southern New England Telephone Company ("Southern New England")	Connecticut	18	Connecticut	Connecticut Public Utilities Commission
Southwestern Bell Telephone Company ("Southwestern Bell")	Missouri	100	Arkansas	Arkansas Public Service Commission
			Kansas	Kansas State Corporation Commission
			Missouri	Missouri Public Service Commission
			Oklahoma	Oklahoma Corporation Commission

Defendant Operating Company	State of Incorporation	Percentage of Capital Stock Owned by AT&T	States in Which Service Is Rendered	State or Local Regulatory Authorities
Southwestern Bell Telephone Company (cont'd)			Texas	Local Regulatory Authorities
Wisconsin Telephone Company ("Wisconsin Telephone")	Wisconsin	100%	Wisconsin	Wisconsin Public Service Commission

Notes:

(1) Pacific Northwest Bell Telephone Company commenced operations on July 1, 1961. Prior to that date the States now served by Pacific Northwest were served by The Pacific Telephone and Telegraph Company.

(2) South Central Bell Telephone Company commenced operations on July 1, 1968. Prior to that date the States now served by South Central Bell were served by Southern Bell Telephone and Telegraph Company.

(3) On December 16, 1972 AT&T's ownership of the capital stock of New England Telephone and Telegraph Company was increased to 85%.

ATTACHMENT B

Filing and Effective Dates of Initial Centrex Tariffs of the Defendant Operating Companies

Operating Company	Date Tariffs Filed	Date Tariffs Effective
Bell of Pennsylvania	6/15/67	8/14/67
Chesapeake and Potomac	12/13/62	1/1/63
C&P of Maryland	8/15/62	9/14/62
C&P of Virginia	7/30/62	8/1/62
C&P of West Virginia	5/28/64	7/1/64
Cincinnati Bell		
Kentucky	10/9/63	11/1/63
Ohio	7/20/63	9/1/63
Diamond State	9/24/68	10/24/68
Illinois Bell		
Illinois	5/17/61	6/17/61
Indiana	3/13/67	4/28/67
Indiana Bell	12/28/61	12/31/61
Michigan Bell	4/18/61	4/18/61
Mountain States		
Arizona	6/27/62	7/27/62
Colorado	8/28/62	10/1/62
Idaho	8/1/62	9/1/62
Montana	1/15/65	2/15/65
New Mexico	6/15/62	7/15/62
Texas	2/11/63	2/18/63
Utah	11/15/63	12/15/63
Wyoming	7/12/62	8/12/62

Operating Company	Date Tariffs Filed	Date Tariffs Effective
New England		
Maine	7/20/62	8/19/62
Massachusetts	7/13/62	8/12/62
New Hampshire	7/20/62	8/19/62
Rhode Island	7/20/62	8/19/62
Vermont	7/20/62	8/19/62
New Jersey Bell	3/20/62	5/4/62
New York Telephone		
Connecticut		5/1/70
New York	10/10/61	12/1/61
Northwestern Bell		
Iowa	4/1/63	4/1/63
Minnesota	3/10/66	4/1/66 (Note 2)
Nebraska	4/30/63	5/10/63
North Dakota	1/21/63	2/21/63
South Dakota	8/1/62	9/1/62
Ohio Bell	12/15/61	3/27/62
Pacific Northwest		
Idaho	2/18/63	4/1/63
Oregon	8/10/62	9/15/62
Washington	12/8/61	1/12/62
Pacific	2/13/62	2/21/62
South Central Bell (Note 1)		
Alabama	3/29/62	4/30/62
Kentucky	2/27/62	3/27/62
Louisiana	2/28/62	3/14/62
Mississippi	2/27/62	3/25/62

Operating Company	Date Tariffs Filed	Date Tariffs Effective
South Central Bell		
(cont'd)		
Tennessee	3/1/62	4/1/62
Southern Bell		
Florida	6/25/62	6/25/62
Georgia	3/15/62	4/15/62
North Carolina	6/20/62	7/30/62
South Carolina	4/23/62	5/23/62
Southern New England	7/20/62	8/5/62
Southwestern Bell		
Arkansas	3/22/62	4/23/62
Kansas	3/15/62	3/15/62
Missouri	3/12/62	4/12/62
Oklahoma	3/15/62	4/15/62
Texas	2/1/62	2/1/62
Wisconsin Telephone	9/13/61	9/15/61

Notes:

(1) The initial Centrex tariffs in the States now served by South Central Bell were filed by Southern Bell before South Central Bell commenced operations on July 1, 1968.

(2) Tariff became effective with statements rendered on or after this date.

ATTACHMENT C

Initial Centrex Tariffs of the Defendant Operating Companies

Operating Company	All Service Features Included	Minimum Number of Stations	Higher Station Rate for CO Than for CU	Restricted Less Than Unrestricted Stations	Initial Contract Period	Both CO and CU	Company Determines CO or CU
Bell of Pennsylvania	Yes	300	No (Note 6)	Yes	5 years	Yes	Yes (Note 9)
Chesapeake & Potomac	No (Note 2)	150	Yes	Yes	3 years	Yes	Yes
C&P of Maryland	No (Note 2)	200	Yes	Yes	3 years	Yes	Yes
C&P of Virginia	No (Note 2)	200	Yes	Yes	3 years	Yes	Yes
C&P of West Virginia	No (Note 2)	200	Yes	Yes	3 years	Yes	Yes
Cincinnati Bell							
Kentucky	No (Note 2)	300	No (Note 8)	Yes	3 years	No (Note 8)	No (Note 8)
Ohio	No (Note 2)	300	No (Note 8)	Yes	3 years	No (Note 8)	No (Note 8)
Diamond State	Yes	100	No (Note 6)	Yes	5 years	Yes	Yes
Illinois Bell							
Illinois	Yes	300	Yes	Yes	2 years	Yes	No (Note 10)
Indiana	Yes	200	Yes	Yes	2 years	Yes	No (Note 10)

Operating Company	All Service Features Included	Minimum Number of Stations	Higher Station Rate for CO Than for CU	Restricted Less Than Unrestricted Stations	Initial Contract Period	Both CO and CU	Company Determines CO or CU
Indiana Bell	No (Note 3)	250	Yes	Yes	3 years	Yes	No (Note 10)
Michigan Bell	No (Notes 2, 3, 4, 5)	250	Yes	No (Note 5)	5 years	Yes	No (Note 10)
Mountain States							
Arizona	No (Notes 2, 4)	300	No (Note 8)	Yes	5 years	No (Note 8)	No (Note 8)
Colorado	Yes	300	No (Note 8)	Yes	5 years	No (Note 8)	No (Note 8)
Idaho	Yes	300	No (Note 8)	Yes	5 years	No (Note 8)	No (Note 8)
Montana	No (Notes 2, 4)	100	No (Note 8)	Yes	5 years	No (Note 8)	No (Note 8)
New Mexico	Yes	300	No (Note 8)	Yes	5 years	No (Note 8)	No (Note 8)
Texas	Yes	300	Yes	Yes	5 years	Yes	Yes
Utah	Yes	300	Yes	Yes	5 years	Yes	Yes
Wyoming	Yes	300	No (Note 8)	Yes	5 years	No (Note 8)	No (Note 8)
New England							
Maine	No (Note 2)	300	No (Note 6)	Yes	1 month	Yes	Yes
Massachusetts	No (Note 2)	300	No (Note 6)	Yes	1 month	Yes	Yes
New Hampshire	No (Note 2)	300	No (Note 6)	Yes	1 month	Yes	Yes

Operating Company	All Service Features Included	Minimum Number of Stations	Higher Station Rate for CO Than for CU	Restricted Less Than Unrestricted Stations	Initial Contract Period	Both CO and CU	Company Determines CO or CU
New England (cont'd)							
Rhode Island	No (Note 2)	300	No (Note 6)	Yes	1 month	Yes	Yes
Vermont	No (Note 2)	300	No (Note 6)	Yes	1 month	Yes	Yes
New Jersey Bell	Yes	300	No (Note 6)	Yes	None	Yes	Yes
New York Telephone							
Connecticut	Yes	100	Yes	Yes	None	Yes	No (Note 10)
New York	Yes	100	Yes	Yes	None	Yes	No (Note 10)
Northwestern Bell							
Iowa	Yes	200	Yes	Yes	5 years	Yes	Yes
Minnesota	Yes	100	Yes	No (Note 7)	5 years	Yes	Yes
Nebraska	No (Notes 2, 4)	200	No (Note 6)	Yes	5 years	Yes	Yes
North Dakota	No (Notes 2, 4)	200	Yes	Yes	5 years	Yes	Yes
South Dakota	No (Notes 2, 4)	200	No (Note 6)	Yes	5 years	Yes	Yes
Ohio Bell	Yes	300	Yes	Yes	3 years	Yes	Yes

Operating Company	All Service Features Included	Minimum Number of Stations	Higher Station Rate for CO Than for CU	Restricted Less Than Unrestricted Stations	Initial Contract Period	Both CO and CU	Company Determines CO or CU
Pacific Northwest							
Idaho	No (Notes 2, 4)	300	No (Note 8)	Yes	5 years	No (Note 8)	No (Note 8)
Oregon	No (Note 2)	300	No (Note 6)	Yes	5 years	Yes	Yes
Washington	No (Notes 2, 4)	300	No (Note 6)	Yes	5 years	Yes	Yes
Pacific	No (Note 2)	300	No (Note 6)	Yes	5 years	Yes	No (Note 11)
South Central Bell (Note 1)							
Alabama	No (Note 2)	300	Yes	Yes	3 years	Yes	Yes (Note 9)
Kentucky	No (Note 2)	300	Yes	Yes	3 years	Yes	Yes (Note 9)
Louisiana	No (Note 2)	300	Yes	Yes	3 years	Yes	Yes (Note 9)
Mississippi	No (Note 2)	300	Yes	Yes	3 years	Yes	Yes (Note 9)
Tennessee	No (Note 2)	300	Yes	Yes	3 years	Yes	Yes (Note 9)
Southern Bell							
Florida	No (Note 2)	300	No (Note 6)	Yes	3 years	Yes	Yes
Georgia	No (Note 2)	300	Yes	Yes	3 years	Yes	Yes (Note 9)

Operating Company	All Service Features Included	Minimum Number of Stations	Higher Station Rate for CO Than for CU	Restricted Less Than Unrestricted Stations	Initial Contract Period	Both CO and CU	Company Determines CO or CU
Southern Bell (cont'd)							
North Carolina	No (Note 2)	300	Yes	Yes	3 years	Yes	Yes (Note 9)
South Carolina	No (Note [illegible])	300	Yes	Yes	3 years	Yes	Yes (Note 9)
Southern New England	Yes	300	Yes	Yes	3 years	Yes	No (Note 10)
Southwestern Bell							
Arkansas	No (Note 2)	500	Yes	Yes	3 years	Yes	Yes
Kansas	No (Note 2)	500	Yes	Yes	3 years	Yes	Yes
Missouri	No (Note 2)	500	Yes	Yes	3 years	Yes	Yes
Oklahoma	No (Note 2)	500	Yes	Yes	3 years	Yes	Yes
Texas	No (Note 2)	500	Yes	Yes	3 years	Yes	Yes
Wisconsin Telephone	No (Note 3)	300	Yes	Yes	5 years	Yes	Yes

Notes:

(1) The initial Centrex tariffs in the States now served by South Central Bell were filed by Southern Bell before South Central Bell commenced operations on July 1, 1968.

(2) Station hunting not offered.

(3) Call intercept not offered.

(4) Night connections not offered.

(5) Restricted stations not offered.

(6) Identical unrestricted station charges for Centrex-CO and Centrex-CU, with an additional charge per station for Centrex-CO.

(7) Restricted station rate same as unrestricted station rate for over 300 unrestricted stations.

(8) Centrex-CO not offered.

(9) Tariff provides that additional charges may be applicable if customer specifies serving vehicle other than that determined by telephone company.

(10) Tariff does not provide that telephone company determines whether to offer Centrex-CO or Centrex-CU, but provides that offering of Centrex service is subject to availability of facilities.

(11) Tariff provides that Centrex-CO is offered at customer's option where facilities permit.

ATTACHMENT D

Rates for Unrestricted Centrex Stations in Effect on January 1, 1963

Operating Company	Minimum Number of Unrestricted Stations	Centrex-CU Charge per Unrestricted Station per Month								Additional Amount per Station for Centrex-CO
		For First-		For Next-		For Next-		For Over-		
		Number	Rate	Number	Rate	Number	Rate	Number	Rate	
Bell of Pennsylvania	-	-	-	-	-	-	-	-	-	-
Chesapeake and Potomac	150	50	$7.00	250	$6.50	600	$5.75	900	$4.50	$.50
C&P of Maryland - F	200	50	9.75	250	9.25	600	8.00	900	5.00	.35
(Note 1) - M			8.00		7.00		5.75		4.00	.50
C&P of Virginia - F	200	50	9.50-10.50	250	8.50-9.75	700	7.50-8.50	1000	5.00	.25-.50
- M			8.00		7.00		6.50		5.00	.75
C&P of West Virginia	-	-	-	-	-	-	-	-	-	-
Cincinnati Bell										
Kentucky	-	-	-	-	-	-	-	-	-	-
Ohio	-	-	-	-	-	-	-	-	-	-
Diamond State	-	-	-	-	-	-	-	-	-	-
Illinois Bell										
Illinois Bell - F	300	250	10.00-10.50	500	9.25-9.50	750	7.35-7.50	1500	6.15-6.25	.25
- M		100	7.50	300	6.50	600	5.50	1000	4.50	.25

Operating Company	Minimum Number of Unrestricted Stations	Centrex-CU Charge per Unrestricted Station per Month								Additional Amount per Station for Centrex-CO
		For First-		For Next-		For Next-		For Over-		
		Number	Rate	Number	Rate	Number	Rate	Number	Rate	
Illinois Bell (cont'd)										
Indiana	-	-	-	-	-	-	-	-	-	-
Indiana Bell	250	250	$7.50-9.50	250	$6.50-8.50	250	$5.00-7.00	750	$3.85-4.25	$.25
Michigan Bell - F	250	250	6.30-8.25	250	5.55-7.25	500	5.30-6.50	1000	5.05-5.75	.20-.25
- M			7.50		6.50		5.50		4.50	.25
Mountain States										
Arizona	300	50	10.50	250	10.00	-	-	300	6.50	-
Colorado	300	50	10.50	250	10.00	-	-	300	6.50	-
Idaho	300	50	10.50	250	10.00	-	-	300	6.50	-
Montana	-	-	-	-	-	-	-	-	-	-
New Mexico	300	50	10.50	250	10.00	-	-	300	6.50	-
Texas	-	-	-	-	-	-	-	-	-	-
Utah	-	-	-	-	-	-	-	-	-	-
Wyoming	300	50	10.50	250	10.00	-	-	300	6.50	-

Operating Company	Minimum Number of Unrestricted Stations	Centrex-CU Charge per Unrestricted Station per Month								Additional Amount per Station for Centrex-CO
		For First-		For Next-		For Next-		For Over-		
		Number	Rate	Number	Rate	Number	Rate	Number	Rate	
New England										
Maine - F	300	50	$10.50-11.50	250	$7.75-8.50	600	$6.50-7.00	900	$5.50-6.00	$.25
- M			8.50		6.00		5.00		4.25	.25
Massachusetts - F	300	50	10.00-11.00	250	7.25-8.00	600	6.00-6.50	900	5.25-5.75	.25
- M			8.50		6.00		5.00		4.25	.25
New Hampshire - F	300	50	10.50-11.50	250	7.75-8.50	600	6.50-7.00	900	5.50-6.00	.25
- M			8.50		6.00		5.00		4.25	.25
Rhode Island - F	300	50	9.75-10.50	250	7.00-7.50	600	5.75-6.25	900	5.00-5.25	.25
- M			8.50		5.75		4.75		4.25	.25
Vermont - F	300	50	10.50-11.50	250	7.50-8.25	600	6.25-7.00	900	5.50-6.00	.25
- M			8.50		6.00		5.00		4.25	.25
New Jersey Bell - F	300	50	9.00-9.50	250	7.75-8.50	600	6.00-6.25	900	4.75-5.00	.30
- M			7.75		6.75		5.50		4.50	.30
New York Telephone										
Connecticut	-	-	-	-	-	-	-	-	-	-
New York - F	100	100	9.05-9.85	600	7.55-8.35	-	-	700	6.30-7.10	.50
- M			8.15		6.65	-			5.40	.75
Northwestern Bell										
Iowa	-	-	-	-	-	-	-	-	-	-

Operating Company	Minimum Number of Unrestricted Stations	Centrex-CU Charge per Unrestricted Station per Month								Additional Amount per Station for Centrex-CO
		For First-		For Next-		For Next-		For Over-		
		Number	Rate	Number	Rate	Number	Rate	Number	Rate	
Northwestern Bell (cont'd)										
Minnesota	-	-	-	-	-	-	-	-	-	-
Nebraska	-	-	-	-	-	-	-	-	-	-
North Dakota	-	-	-	-	-	-	-	-	-	-
South Dakota	200	50	$8.75-9.50	250	$8.25-8.75	600	$6.25-6.75	900	$4.75-5.00	$.25
Ohio Bell - F	200	300	9.50-10.50	600	7.50-8.25	-	-	900	4.50-5.00	.25-.35
- M			7.75		5.75	-	-		4.00	.50
Pacific Northwest										
Idaho	-	-	-	-	-	-	-	-	-	-
Oregon	300	300	9.00-9.50	600	7.50-8.00	-	-	900	5.00-5.50	.35
Washington	300	300	8.50-9.50	600	7.00-8.00	-	-	900	4.50-5.50	.35
Pacific - F	300	100	6.67-7.33	700	5.50-6.25	-	-	1000	5.25-6.00	.35
- M			6.50		5.00	-	-		4.50	.35
South Central Bell (Note 2)										
Alabama	300	50	9.00-10.00	250	8.50-9.50	600	7.00-7.50	900	5.00-5.50	.25-.35

Operating Company	Minimum Number of Unrestricted Stations	Centrex-CU Charge per Unrestricted Station per Month								Additional Amount per Station for Centrex-CO
		For First- Number	Rate	For Next- Number	Rate	For Next- Number	Rate	For Over- Number	Rate	
South Central Bell (cont'd)										
Kentucky	300	50	$8.75-9.85	250	$8.25-9.35	600	$6.75-7.30	900	$4.75-5.30	$.25-.35
Lousiana	300	50	9.00-9.60	250	8.50-9.10	600	7.00-7.25	900	5.00-5.25	.25-.35
Mississippi	300	50	8.75-9.10	250	8.25-8.60	600	6.75-7.00	900	4.75-5.00	.25-.35
Tennessee	300	50	8.60-9.75	250	8.10-9.25	600	6.75-7.25	900	4.75-5.25	.25-.35
Southern Bell										
Florida	300	50	8.25-9.90	250	7.75-9.40	600	6.50-7.90	900	4.95-6.10	.25-.35
Georgia	300	50	8.25-9.25	250	7.75-8.75	600	6.50-7.00	900	4.50-5.00	.25-.35
North Carolina	300	50	8.50-9.00	250	8.00-8.50	600	6.65-6.90	900	4.65-4.90	.25-.35
South Carolina	300	50	8.60-9.15	250	8.10-8.65	600	6.75-7.00	900	4.75-5.00	.25-.35
Southern New England	300	50	9.50-10.25	250	8.25-9.00	700	6.50-7.25	1000	5.25-6.00	.50
Southwestern Bell										
Arkansas	500	500	10.00-10.50	-	-	-	-	500	5.50-6.00	.25
Kansas	500	500	10.00-10.50	-	-	-	-	500	5.50-6.00	.25
Missouri	500	500	10.00-10.50	-	-	-	-	500	5.50-6.00	.25

Operating Company	Minimum Number of Unrestricted Stations	Centrex-CU Charge per Unrestricted Station per Month								Additional Amount per Station for Centrex-CO
		For First-		For Next-		For Next-		For Over-		
		Number	Rate	Number	Rate	Number	Rate	Number	Rate	
Southwestern Bell (cont'd)										
Oklahoma	500	500	$10.00-10.50	-	-	-	-	500	$5.50-6.00	$.25
Texas	500	500	10.00-10.50	-	-	-	-	500	5.50-6.00	.25
Wisconsin Telephone - F	300	50	9.00	250	$8.50	600	$5.60	900	4.30	.25
- M			7.50		6.50		5.25		4.00	.35

Notes:

(1) In States having both flat rates and measured rates for unrestricted Centrex stations, "F" denotes flat rates and "M" denotes measured rates.

(2) On January 1, 1963, the States now served by South Central Bell were served by Southern Bell.

ATTACHMENT E

Rates for Unrestricted Centrex Stations in Effect on January 1, 1966

Operating Company	Minimum Number of Unrestricted Stations	Centrex-CU Charge per Unrestricted Station per Month For First- Number	Rate	For Next- Number	Rate	For Next- Number	Rate	For Over- Number	Rate	Additional Amount per Station for Centrex-CO
Bell of Pennsylvania	-	-	-	-	-	-	-	-	-	-
Chesapeake and Potomac	150	50	$7.00	250	$6.50	600	$5.75	900	$4.50	$.50
C&P of Maryland - F	200	50	9.75	250	9.25	600	8.00	900	5.00	.35
(Note 1) - M			8.00		7.00		5.75		4.00	.50
C&P of Virginia - F	200	50	9.50-10.50	250	8.50-9.75	700	7.50-8.50	1000	5.00	.25-.50
- M			8.00		7.00		6.50		5.00	.75
C&P of West Virginia	200	50	9.75	250	9.25	600	8.25	900	6.75	.35
Cincinnati Bell										
Kentucky	100	100	12.85-14.10	100	8.60-10.35	700	7.60-8.35	900	5.10-5.60	.50
Ohio	100	100	12.25-13.50	100	8.00-9.75	700	7.00-7.75	900	4.50-5.00	.50
Diamond State	-	-	-	-	-	-	-	-	-	-
Illinois Bell										
Illinois Bell - F	200	250	10.00-11.50	500	9.25-10.50	750	7.35-8.50	1500	6.15-7.25	.25
- M		100	7.50-8.50	300	6.50-7.50	600	5.50-6.50	1000	4.50-5.50	.25

Operating Company	Minimum Number of Unrestricted Stations	Centrex-CU Charge per Unrestricted Station per Month For First- Number	Rate	For Next- Number	Rate	For Next- Number	Rate	For Over- Number	Rate	Additional Amount per Station for Centrex-CO
Illinois Bell										
(cont'd)										
Indiana	-	-	-	-	-	-	-	-	-	-
Indiana Bell	250	250	$7.50-9.50	250	$6.50-8.50	250	$5.00-7.00	750	$3.85-4.25	$.25
Michigan Bell - F	250	250	6.30-8.25	250	5.55-7.25	500	5.30-6.50	1000	5.05-5.75	.20-.25
- M			7.50		6.50		5.50		4.50	.25
Mountain States										
Arizona	100	50	10.50	250	10.00	-	-	300	6.50	-
Colorado	100	100	13.75	100	10.00	-	-	200	6.50	-
Idaho	100	100	13.75	100	10.00	-	-	200	6.50	-
Montana	100	100	13.75	100	10.00	-	-	200	6.50	-
New Mexico	100	100	13.75	100	10.00	-	-	200	6.50	-
Texas	100	50	10.00	250	9.50	-	-	300	6.00	.35
Utah	100	100	13.25	100	9.50	-	-	200	6.00	.35
Wyoming	100	100	13.75	100	10.00	-	-	200	6.50	-

Operating Company	Minimum Number of Unrestricted Stations	Centrex-CU Charge per Unrestricted Station per Month								Additional Amount per Station for Centrex-CO
		For First-		For Next-		For Next-		For Over-		
		Number	Rate	Number	Rate	Number	Rate	Number	Rate	
New England										
Maine - F	100	50	$10.50-16.50	250	$6.50-11.50	600	$6.50-7.00	900	$5.50-6.00	$.25
- M			8.50-13.00		5.00-8.00		5.00		4.25	.25
Massachusetts - F	100	50	10.00-16.00	250	6.00-11.00	600	6.00-6.50	900	5.25-5.75	.25
- M			8.50-13.00		5.00-8.00		5.00		4.25	.25
New Hampshire - F	100	50	10.50-16.50	250	6.50-11.50	600	6.50-7.00	900	5.50-6.00	.25
- M			8.50-13.00		5.00-8.00		6.00		4.25	.25
Rhode Island - F	100	50	9.75-15.50	250	5.75-10.50	600	5.75-6.25	900	5.00-5.25	.25
- M			8.50-13.00		5.00-8.00		4.75-5.00		4.25-5.00	.25
Vermont - F	300	50	10.50-11.50	250	7.50-8.25	600	6.25-7.00	900	5.50-6.00	.25
- M			8.50		6.00		5.00		4.25	.25
New Jersey Bell - F	100	100	10.75-11.75	100	7.00-8.00	700	6.00-6.25	900	4.75-5.00	.30
- M			9.25		6.00		5.50		4.50	.30
New York Telephone										
Connecticut	-	-	-	-	-	-	-	-	-	-
New York - F	100	100	9.05-9.85	600	7.55-8.35	-	-	700	6.30-7.10	.50
- M			8.15		6.65	-	-		5.40	.75
Northwestern Bell										
Iowa	200	50	7.50-9.50	250	7.00-9.00	600	4.75-7.00	900	4.25-5.25	.25

Operating Company	Minimum Number of Unrestricted Stations	Centrex-CU Charge per Unrestricted Station per Month								Additional Amount per Station for Centrex-CO
		For First-		For Next-		For Next-		For Over-		
		Number	Rate	Number	Rate	Number	Rate	Number	Rate	
Northwestern Bell (cont'd)										
Minnesota	-	-	-	-	-	-	-	-	-	-
Nebraska	200	50	$8.75-9.75	250	$8.25-9.25	600	$6.25-7.00	900	$4.75-5.25	$.25
North Dakota	200	50	8.75-9.25	250	8.25-8.75	600	6.25-6.50	900	4.75-5.00	.25
South Dakota	100	100	11.75-12.50	100	7.00-7.25	700	6.25-6.75	900	4.75-5.00	.25
Ohio Bell - F	200	300	9.50-10.50	600	7.50-8.25	-	-	900	4.50-5.00	.25-.35
- M			7.75		5.75	-	-		4.00	.50
Pacific Northwest										
Idaho	300	50	10.50	250	10.00	-	-	300	6.50	-
Oregon	300	300	9.00-9.50	600	7.50-8.00	-	-	900	5.00-5.50	.35
Washington	300	300	8.50-9.50	600	7.00-8.00	-	-	900	4.50-5.50	.35
Pacific - F	300	300	6.67-7.33	700	5.50-6.25	-	-	1000	5.25-6.00	.35
- M			6.50		5.00	-	-		4.50	.35
South Central Bell (Note 3)										
Alabama	300	50	9.00-10.00	250	8.50-9.50	600	7.00-7.50	900	5.00-5.50	.25-.35

Operating Company	Minimum Number of Unrestricted Stations	Centrex-CU Charge per Unrestricted Station per Month								Additional Amount per Station for Centrex-CO
		For First-		For Next-		For Next-		For Over-		
		Number	Rate	Number	Rate	Number	Rate	Number	Rate	
South Central Bell (cont'd)										
Kentucky	300	50	$8.75-9.85	250	$8.25-9.35	600	$6.75-7.30	900	$4.75-5.30	$.25-.35
Lousiana	300	50	9.00-9.60	250	8.50-9.10	600	7.00-7.25	900	5.00-5.25	.25-.35
Mississippi	300	50	8.75-9.10	250	8.25-8.60	600	6.75-7.00	900	4.75-5.00	.25-.35
Tennessee	300	50	8.60-9.75	250	8.10-9.25	600	6.75-7.25	900	4.75-5.25	.25-.35
Southern Bell										
Florida	300	50	8.25-9.50	250	7.75-9.00	600	6.50-7.50	900	4.95-5.75	.25-.35
Georgia	300	50	8.25-9.25	250	7.75-8.75	600	6.50-7.00	900	4.50-5.00	.25-.35
North Carolina	300	50	8.50-9.00	250	8.00-8.50	600	6.65-6.90	900	4.65-4.90	.25-.35
South Carolina	300	50	8.60-9.15	250	8.10-8.65	600	6.75-7.00	900	4.75-5.00	.25-.35
Southern New England	300	50	9.50-10.25	250	8.25-9.00	700	6.50-7.25	1000	5.25-6.00	.50
Southwestern Bell										
Arkansas	200	200	11.75-12.25	300	9.75-10.25	-	-	500	5.50-6.00	.25
Kansas	500	500	10.00-10.50	-	-	-	-	500	5.50-6.00	.25
Missouri	500	500	10.00-10.50	-	-	-	-	500	5.50-6.00	.25

Operating Company	Minimum Number of Unrestricted Stations	Centrex-CU Charge per Unrestricted Station per Month								Additional Amount per Station for Centrex-CO
		For First-		For Next-		For Next-		For Over-		
		Number	Rate	Number	Rate	Number	Rate	Number	Rate	
Southwestern Bell (cont'd)										
Oklahoma	200	200	$11.75-12.25	300	$9.75-10.25	-	-	500	$5.50-6.00	$.25
Texas	200	200	11.75-12.25	300	9.75-10.25	-	-	500	5.50-6.00	.25
Wisconsin Telephone - F	300	50	9.00	250	8.50	600	$6.50	900	4.50	.25
- M			7.50		6.50		5.25		4.00	.35

Notes:

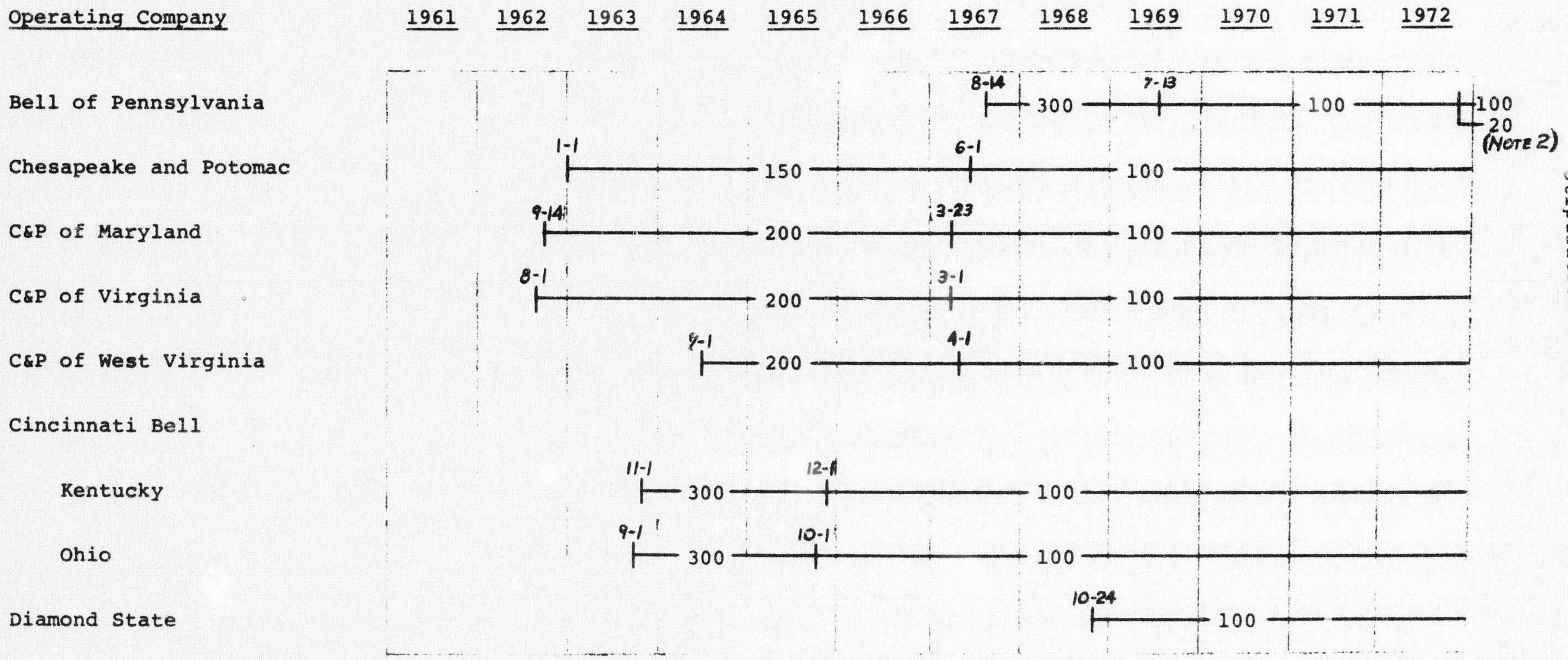
(1) In States having both flat rates and measured rates for unrestricted Centrex stations, "F" denotes flat rates and "M" denotes measured rates.

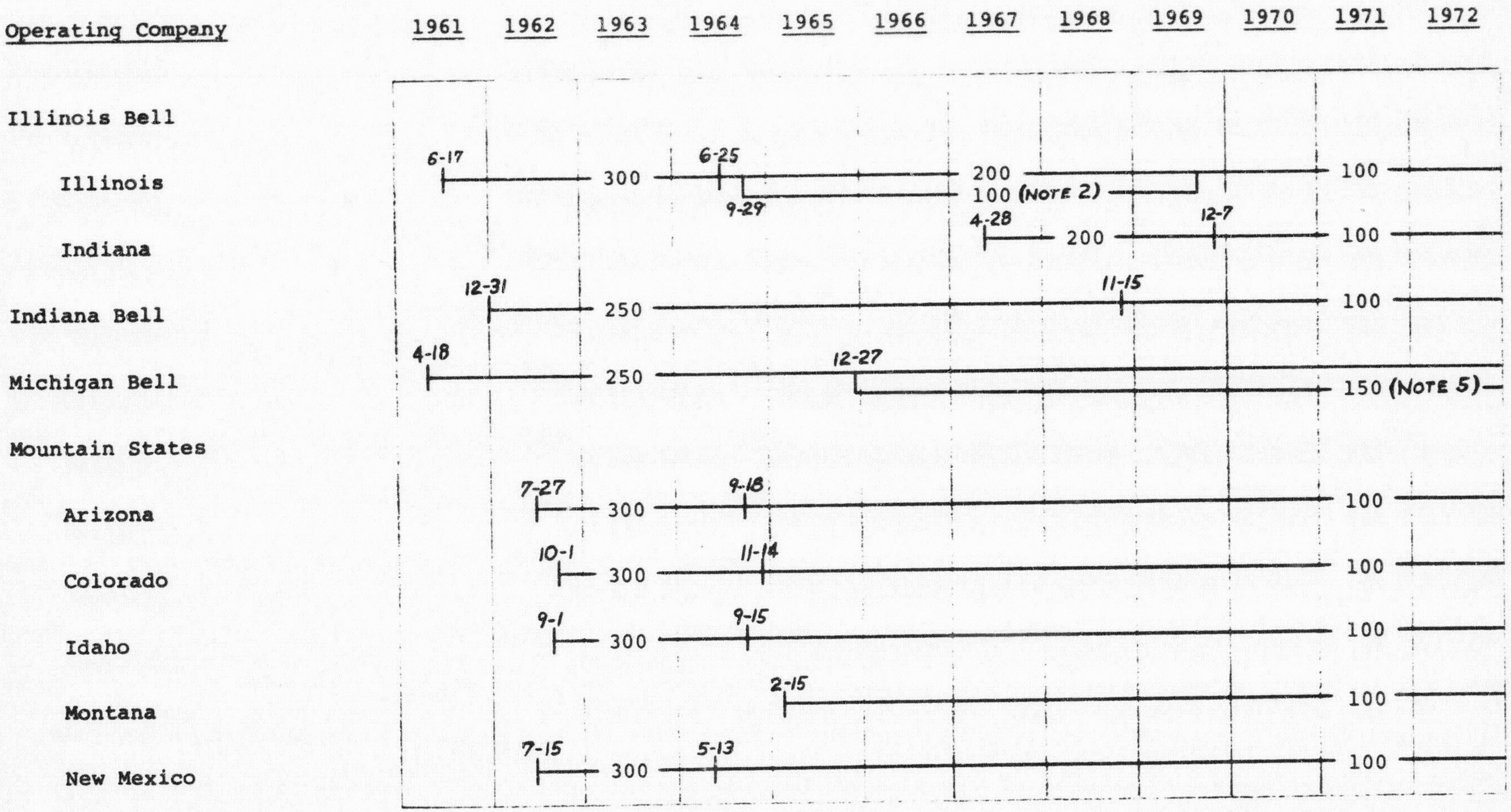
(2) In States where Centrex II service was offered on January 1, 1966, the rates shown above are for Centrex I service only.

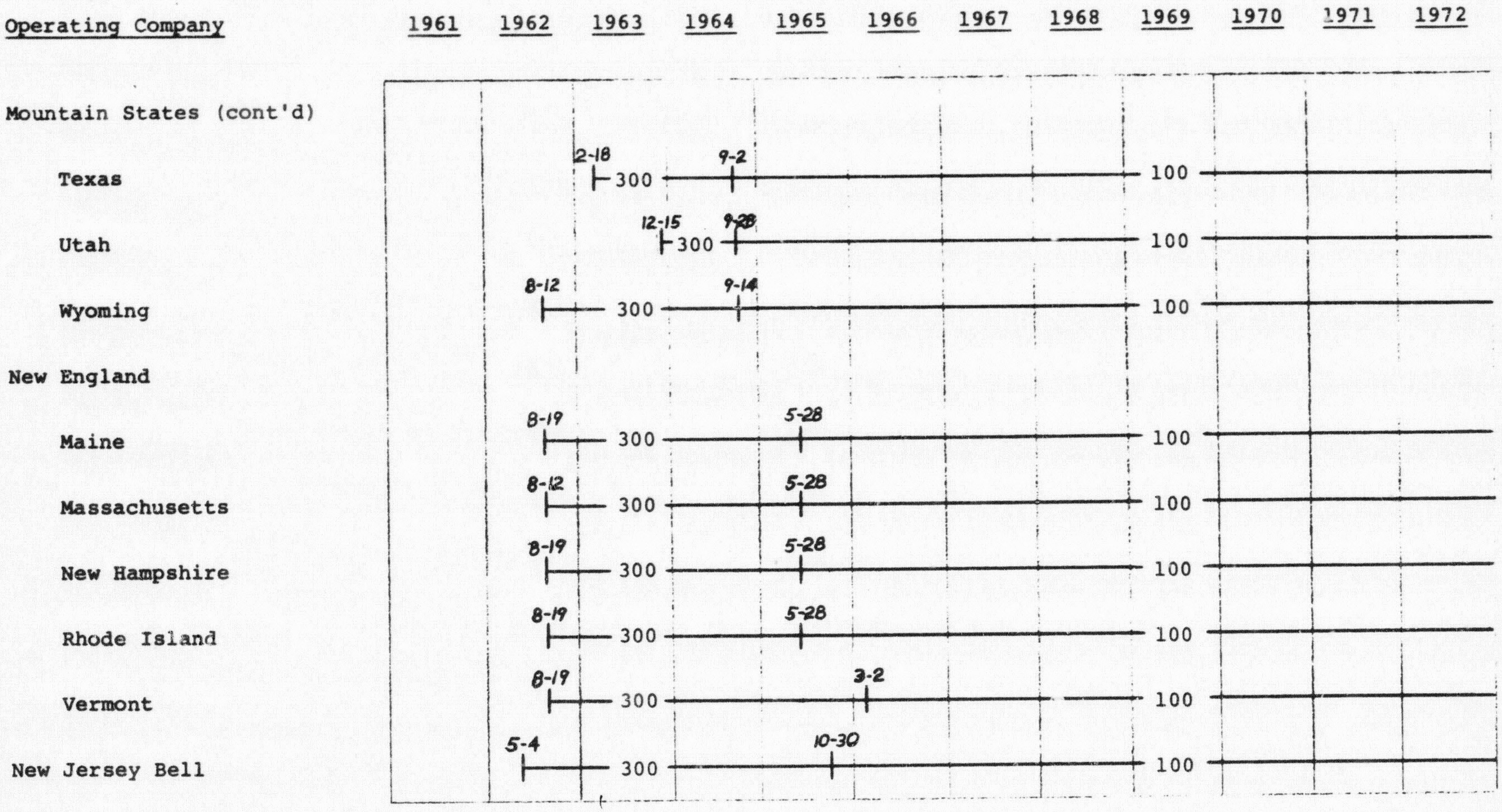
(3) On January 1, 1966, the States now served by South Central Bell were served by Southern Bell.

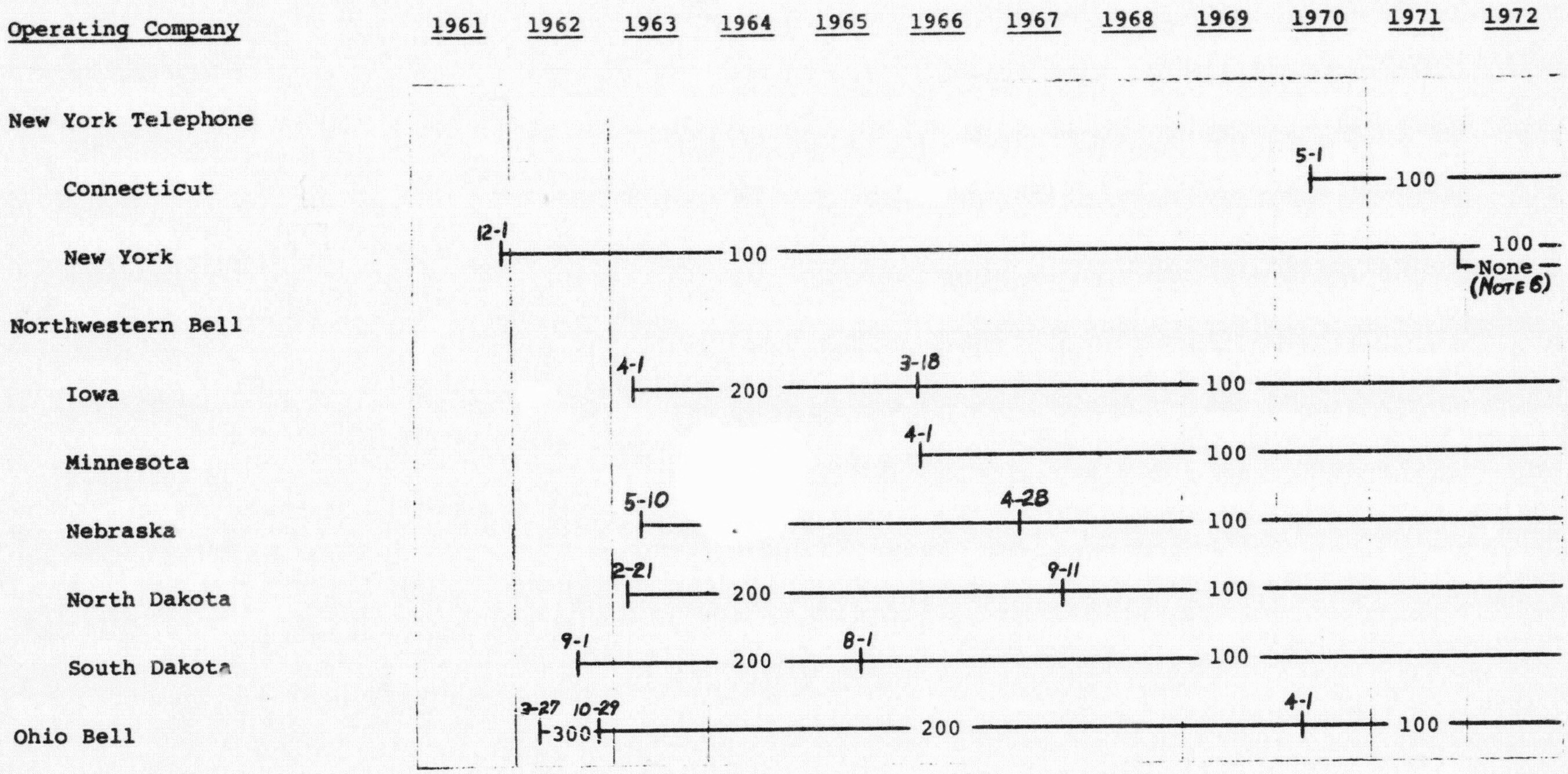
ATTACHMENT F

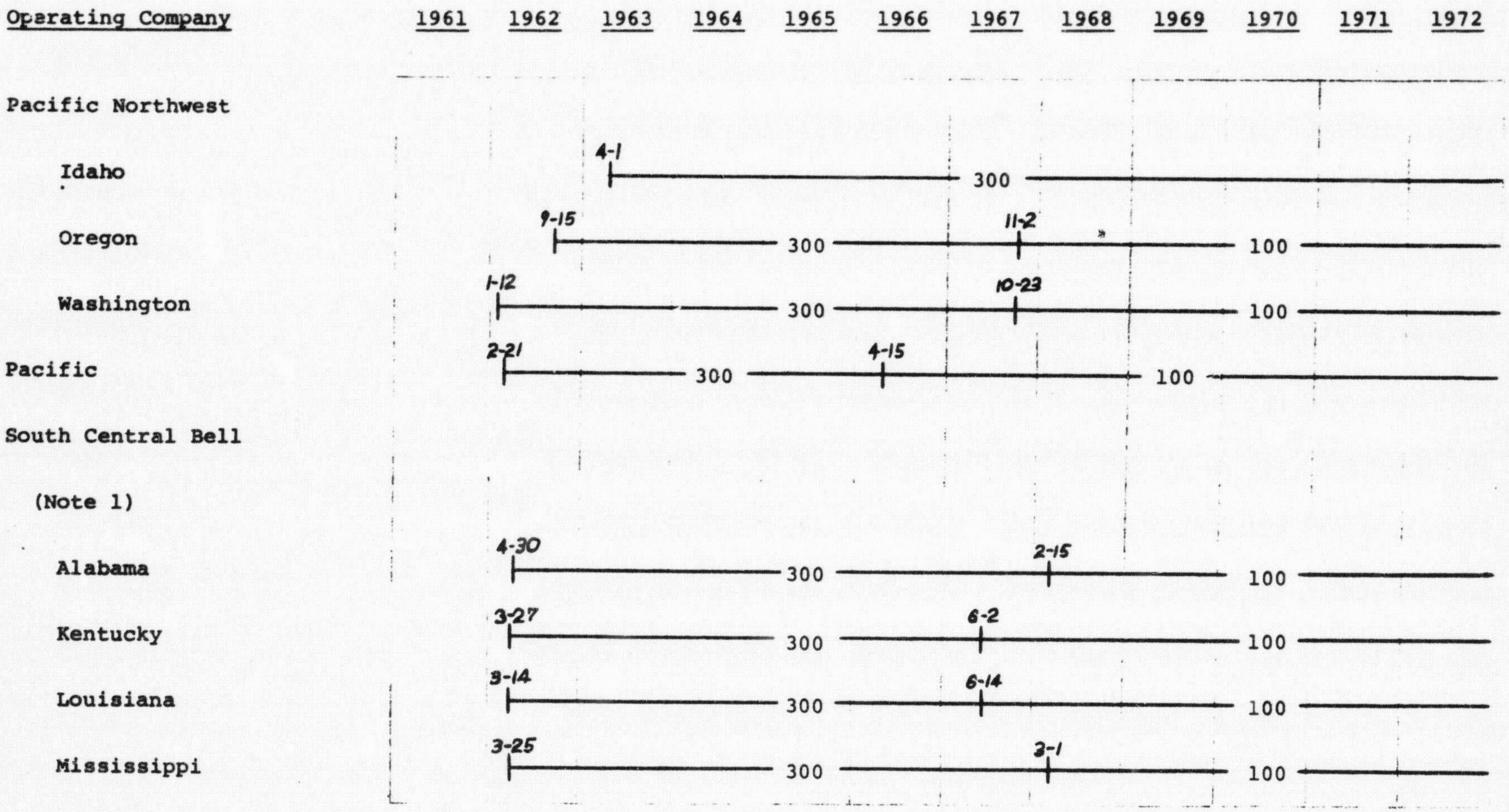
Minimum Numbers of Unrestricted Centrex Stations

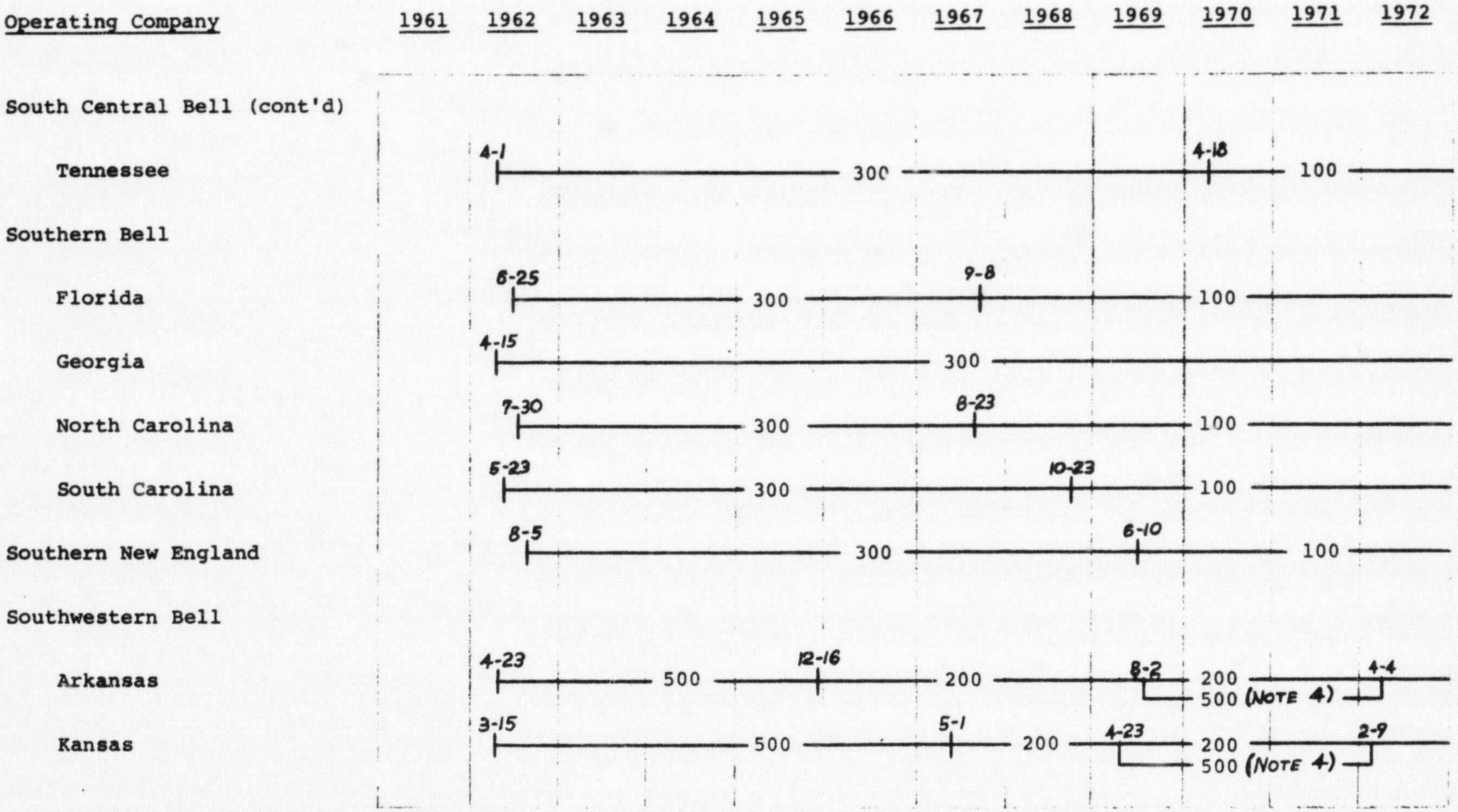


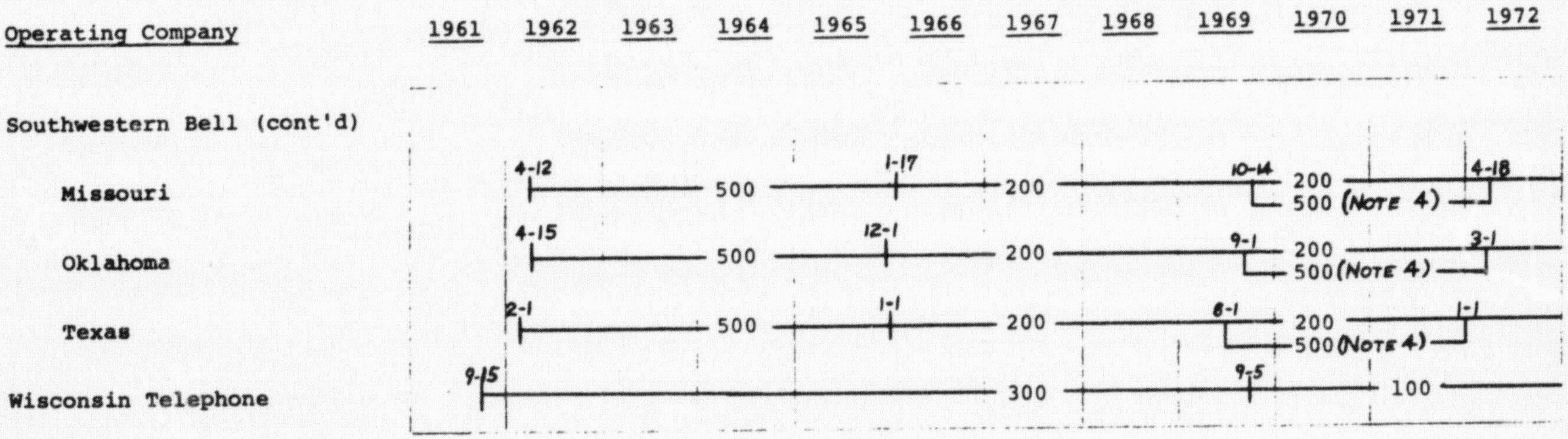

Operating Company
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
Illinois Bell
Illinois
6-17
300
6-25
200
100
9-29
100 (NOTE 2)
Indiana
4-28
200
12-7
100
Indiana Bell
12-31
250
11-15
100
Michigan Bell
4-18
250
12-27
150 (NOTE 5)
Mountain States
Arizona
7-27
300
9-18
100
Colorado
10-1
300
11-14
100
Idaho
9-1
300
9-15
100
Montana
2-15
100
New Mexico
7-15
300
5-13
100


Operating Company
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
Mountain States (cont'd)
Texas 2-18 300 9-2 100
Utah 12-15 300 9-28 100
Wyoming 8-12 300 9-14 100
New England
Maine 8-19 300 5-28 100
Massachusetts 8-12 300 5-28 100
New Hampshire 8-19 300 5-28 100
Rhode Island 8-19 300 5-28 100
Vermont 8-19 300 3-2 100
New Jersey Bell 5-4 300 10-30 100


Operating Company
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
New York Telephone
Connecticut
5-1
100
New York
12-1
100
100
None
(Note 6)
Northwestern Bell
Iowa
4-1
200
3-18
100
Minnesota
4-1
100
Nebraska
5-10
4-28
100
North Dakota
2-21
200
9-11
100
South Dakota
9-1
200
8-1
100
Ohio Bell
3-27
10-29
300
200
4-1
100


Operating Company
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
Pacific Northwest
Idaho
4-1
300
Oregon
9-15
300
11-2
*
100
Washington
1-12
300
10-23
100
Pacific
2-21
300
4-15
100
South Central Bell
(Note 1)
Alabama
4-30
300
2-15
100
Kentucky
3-27
300
6-2
100
Louisiana
3-14
300
6-14
100
Mississippi
3-25
300
3-1
100


Operating Company
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
South Central Bell (cont'd)
Tennessee
4-1
300
4-18
100
Southern Bell
Florida
6-25
300
9-8
100
Georgia
4-15
300
North Carolina
7-30
300
8-23
100
South Carolina
5-23
300
10-23
100
Southern New England
8-5
300
6-10
100
Southwestern Bell
Arkansas
4-23
500
12-16
200
8-2
200
500 (NOTE 4)
4-4
Kansas
3-15
500
5-1
200
4-23
200
500 (NOTE 4)
2-9



Notes:

(1) During the period prior to July 1, 1968, the States now served by South Central Bell were served by Southern Bell.

(2) Minimum for Custom Centrex Service.

(3) Minimum for Centrex II and Centrex III.

(4) Minimum for Centrex-CO.

(5) Minimum for Centrex II.

(6) No minimum for Centrex II-SB (Small Business).

(7) Minimum for Centrex II-CO.

ATTACHMENT G

Filing and Effective Dates of Revised Centrex Tariffs Establishing Separate Station Charges for Exchange Access and for Intercommunication

Operating Company	Date Tariffs Filed	Date Tariffs Effective
Bell of Pennsylvania	11/3/71	11/4/71 (Note 1)
Chesapeake and Potomac	3/21/72	4/1/72
C&P of Maryland	2/25/72	3/28/72
C&P of Virginia	3/24/72	4/1/72
C&P of West Virginia	6/19/72	7/20/72
Cincinnati Bell		
Kentucky	10/29/71	12/1/71
Ohio	11/1/71	12/1/71
Diamond State	9/24/71	10/24/71 (Note 1)
Illinois Bell		
Illinois	11/12/71	11/12/71
Indiana	1/12/72	2/12/72
Indiana Bell	12/22/71	1/1/72
Michigan Bell	8/21/72	8/25/72
Mountain States		
Arizona	9/29/72	11/1/72
Colorado	11/13/72	12/13/72 (Note 2)
Idaho	9/1/72	10/1/72
Montana	9/1/72	10/1/72
New Mexico	10/19/72	11/19/72
Texas	9/21/72	11/15/72
Utah	9/1/72	10/1/72
Wyoming	11/1/72	12/1/72

Operating Company	Date Tariffs Filed	Date Tariffs Effective
New England		
Maine	8/4/72	9/5/72
Massachusetts	9/8/72	10/8/72
New Hampshire	8/4/72	9/5/72
Rhode Island	8/4/72	9/5/72
Vermont	8/4/72	9/5/72
New Jersey Bell	5/22/72	7/7/72
New York Telephone		
Connecticut		8/1/72
New York	6/15/72	8/1/72
Northwestern Bell		
Iowa	8/31/72	9/29/72
Minnesota	5/18/72	6/1/72 (Note 1)
Nebraska	10/5/72	11/1/72 (Note 1)
North Dakota	8/21/72	10/1/72 (Note 1)
South Dakota	3/13/73	4/19/73 (Note 1)
Ohio Bell	2/23/72	3/1/72
Pacific Northwest		
Idaho	3/17/72	4/21/72
Oregon	2/14/72	3/20/72
Washington	2/14/72	3/20/72
Pacific	2/1/72	3/2/72
South Central Bell		
Alabama	6/5/72	7/6/72
Kentucky	7/15/72	8/15/72
Louisiana	7/3/72	8/3/72 (Note 1)
Mississippi	6/16/72	8/1/72
Tennessee	6/9/72	7/10/72

Operating Company	Date Tariffs Filed	Date Tariffs Effective
Southern Bell		
Florida	1/7/72	1/21/72
Georgia	5/15/72	6/15/72
North Carolina	8/4/72	9/11/72
South Carolina	6/1/72	6/15/72
Southern New England	9/25/72	10/1/72
Southwestern Bell		
Arkansas	4/3/72	4/4/72
Kansas	4/15/72	4/15/72
Missouri	4/11/72	4/18/72
Oklahoma	3/30/72	5/1/72
Texas	5/1/72	5/1/72
Wisconsin Telephone	1/12/72	1/21/72

Note:

(1) Tariff became effective with statements rendered on or after this date.

(2) This effective date applies only to Centrex-CU. The revised tariff was not permitted to become effective as to Centrex-CO.

ATTACHMENT H

Persons Employed by AT&T

Name	Position and Time	Reporting Levels Below AT&T Vice President
Thomas J. Burkinshaw	Supervisor, Exchange Service Division, Market and Service Plans Department (9/70-1/1/73)	4
Earl L. Burroughs	Tax Accountant, General Tax Section, Comptroller's Department (8/1/62-5/31/65)	4
Ernest R. Charvat	Tax Attorney, General Tax Attorney's Office (12/18/61-10/1/72)	3
Richard T. Dugan	Assistant Vice President, Marketing and Rate Plans Department (5/68-9/30/69)	1
	Assistant Vice President, Market and Service Plans Department (10/4/69-12/31/72)	1
Carl E. Erickson	Tax Accountant (1/1/61-10/31/63)	4
	Supervising Tax Accountant, General Tax Section, Comptroller's Department (11/1/63-10/5/67)	3
	Tax Research Supervisor, General Tax Section, Comptroller's Department (10/6/67-11/14/70)	3
	Manager-Tax Research, General Tax Section, Comptroller's Department (11/15/70-12/31/72)	3
Victor E. Ferrall	General Tax Attorney and Assistant Secretary (1/1/61-2/28/72)	1
Robert N. Flint	Tax Attorney, General Tax Attorney's Office (1/1/61-9/30/64)	2
	Assistant Comptroller (11/1/64-4/30/68)	1

Name	Position and Time	Reporting Levels Below AT&T Vice President
Ronald J. Foulis	Attorney, Legal Department (1/1/61-3/31/69)	2
John G. Fox	Assistant Vice President and Attorney (11/61-12/31/72)	1
Frank L. Fuller, III	Tax Attorney, General Tax Attorney's Office (1/1/61-2/28/72)	2
	General Tax Attorney and Assistant Secretary (3/1/72-12/31/72)	1
Robert M. Kemp	Exchange Rate Division, Operations Department (1/1/61-12/31/62)	4
	Rate Development Supervisor, Rate Division, Operations, Planning and Marketing and Rate Plans Departments (1/1/63-3/67)	3
	Marketing Manager, Exchange Services Division, Marketing and Rate Plans Department (4/67-12/31/72)	3
H. L. Kertz	Assistant Vice President, Rate Division, Operations Department (1/1/61-6/30/63)	1
	Assistant Vice President, Rate Division, Planning Department (7/1/63-5/30/64)	1
Scott Shepherd	Staff Representative, Rate Division, Planning Department (1/1/64-5/66)	4
Frederick C. Smith	Rate Administrator, Rate Division, Operations, Planning, and Marketing and Rate Plans Departments (1/1/61-4/30/68)	2
	Marketing Director, Exchange Services Division, Marketing and Rate Plans and Market and Service Plans Departments (5/1/68-4/70)	2
Alexander L. Stott	Comptroller (1/1/61-9/30/61)	-
	Vice President and Comptroller (10/1/61-12/31/72)	-

Name	Position and Time	Reporting Levels Below AT&T Vice President
Harold A. Tindall	Tax Accountant, General Tax Section, Comptroller's Department (2/1/66-12/31/72)	4
Alvin von Auw	Vice President and Assistant to the Chairman of the Board (1969-12/31/72)	-
Robert D. Weber	Exchange Rate Engineer, Rate Division, Operations and Planning Departments (1/1/61-7/63)	4
	Exchange Rate Supervisor, Rate Division, Planning Department and Exchange Services Division, Marketing and Rate Plans Department (8/63-3/67)	3
Robert G. Zender	Assistant Comptroller (5/71-12/31/72)	1

ATTACHMENT I

Bank Accounts in New York

Defendant	Bank	Period	Approximate Average Balance
Ohio Bell	The Bank of New York	7/68	$53,000,000
	Chase Manhattan Bank	3/67	75,000,000
	Chase Manhattan Bank	10/71	149,000,000
	Chemical Bank New York Trust Company	1/70	100,000,000
	Manufacturers Hanover Trust Company	2/66	60,000,000
Pacific Northwest	Manufacturers Hanover Trust Company	1/6/70-12/31/73	10,000
Pacific	Bankers Trust Company	11/15/66-11/16/66	4,000,000
	Chase Manhattan Bank	1/1/66-12/31/73	500,000
	Chase Manhattan Bank	4/8/70-4/20/70	250,000
	Irving Trust Company	11/28/66-12/23/66	1,000,000
	Irving Trust Company	3/11/69-4/14/69	500,000
	Irving Trust Company	12/2/69-12/20/69	1,000,000
	Irving Trust Company	3/18/71-3/25/71	29,000,000
	Irving Trust Company	9/10/71-10/18/71	770,000
	Irving Trust Company	6/7/73-6/25/73	136,000
	Manufacturers Hanover Trust Company	7/23/68-7/24/68	5,000,000
	Manufacturers Hanover Trust Company	10/23/70-10/30/70	1,000,000
	Manufacturers Hanover Trust Company	2/15/72-2/29/72	5,000,000
	Manufacturers Hanover Trust Company	2/15/72-2/29/72	13,000,000

Defendant	Bank	Period	Approximate Average Balance
Pacific (cont'd)	Manufacturers Hanover Trust Company	5/31/73-6/6/73	$16,000,000
	Manufacturers Hanover Trust Company	5/31/73-6/6/73	32,000,000
Southern New England	Chase Manhattan Bank	1/1/66-12/31/73	63,000

ATTACHMENT J

Days Spent in New York on Business by Officers of 19 Defendant Operating Companies January 1, 1966 - December 31, 1973

Defendant Operating Company	Total Days Spent During Entire Period	Average Days Spent Per Year
Bell of Pennsylvania	392	49
C&P of Maryland	689	86
C&P of Virginia	733	92
C&P of West Virginia	695	87
Cincinnati Bell	171	21
Diamond State	392	49
Illinois Bell	325	41
Indiana Bell	230	29
Michigan Bell	468	59
Mountain States	383	48
New Jersey Bell	400	50
Northwestern Bell	300	38
Ohio Bell	614	77
Pacific Northwest	124	16
Pacific	510	64
South Central Bell	250 (Note 1)	45
Southern New England	170	21
Southwestern Bell	194	24
Wisconsin Telephone	297	37

Note:

(1) This figure is for the period from July 1, 1968, when South Central Bell commenced operations, through December 31, 1973.

Due and timely service of one copy of

the within Appendix Vol 1 is hereby admitted this

2nd day of December, 1977

Attorney for

Robert B. Fiske Jr.

12/2/77

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